

10 M 2

A
Selection of Rules
OCCURRING IN THE
PROSECUTION AND DEFENCE
OF
Personal Actions
IN THE COURT OF
King's Bench;
WITH
NOTES ON EACH RULE,
ILLUSTRATIVE OF THE
Practice of the Court.

BY
WILLIAM HANDS,
One of the Attornies of the Court.

LONDON:
PRINTED FOR E. AND R. BROOKE,
BELL-YARD, TEMPLE-BAR.

M.DCCC.XCV.

K

K

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX AND TILDEN FOUNDATIONS

1195 N. 5th St. New York, N. Y.

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX AND TILDEN FOUNDATIONS

1195 N. 5th St. New York, N. Y.

1895

P R E F A C E.

THE following *Selection* of *Rules* is part of a collection originally made by the compiler in the course of his practice, for his own private use: but as they appeared to him, in some measure, to shew what is the *present* practice of the court in which they were made, he conceived they would be serviceable to the profession; and in order to make them as much so as was in his power, he has added such *Notes* thereon as thirteen years constant practice in town has enabled him *, and which he presumes will, in general, appear correct, at least he has done his endeavours to make them so; and therein will be found interspersed a few *cases* in *points* of *practice* not in print.

* The compiler was articled in London (where he served his clerkship, and has ever since practised) in Tri. vac. 1782; admitted in the courts of King's Bench and Common Pleas in Hil. Term, 1790, and in the court of Chancery in the Tri. vac. following.

And the compiler's aim in this selection being to assist the *junior* part of that branch of the profession of which he is himself a member, in acquiring a competent knowledge of the *practice* of the court of *King's Bench*, he now dedicates the whole to them; hoping it may contribute towards enabling them to make the remark of the very instructive writer of a late publication*, who seems to think that "formerly the attorney of a court "knew the practice of his court, but that now, "he knows *nothing* of the matter," less applicable in future than it has hitherto been; and which observation, with the one of a celebrated noble writer's†, that "every man is a *debtor* "to his profession," induced the compiler to offer his, the present Selection.

He therefore trusts they will view this attempt to assist the junior part of them with their accustomed *indulgence*; especially as it seems the *smallest* acquisition of legal knowledge is by no means to be considered as a matter of contempt‡; and should it prove in any degree useful, the end for which it was compiled will be attained.

Mark Lane, London,
2d October, 1795.

W. H A N D S.

* The Barrister.

† Lord Bacon.

‡ Simpson's Reflections, by Dawes.

T A B L E

T A B L E

O F T H E

C O N T E N T S.

R U L E S.

	Page
Nisi and absolute to discharge a privileged person from an arrest, on fling common bail — — —	1, 2
..... for an attorney to put in and perfect bail pursuant to his undertaking — — —	10
To return the writ — — —	12
... bring in the body — — —	15
For an attachment against the sheriff for not bringing in the body — — —	16
Allowing bail — — —	20
For time to declare — — —	22
... further time to declare — — —	ib.
... the plaintiff peremptorily to declare — — —	ib.
To discontinue — — —	25
..... as to one defendant — — —	ib.

	Page
To change the venue — — —	28
... bring back the venue — — —	31
Nisi and absolute to consolidate — — —	33, 34
..... set aside a judgement and execution levied thereon, for irregularity, with costs. — — —	37
..... regular interlocutory judgement, and subsequent proceedings thereon, upon payment of costs — — —	42
..... refer it to the master to calculate the principal and interest on a note of hand (or bill of exchange); and for the plaintiff to be at liberty to sign final judgement thereon, without executing a writ of inquiry of damages — — —	45
To pay money into court — — —	48
... plead several matters — — —	55
For the defendant to abide by his plea — — —	57
To compound in a qui tam action — — —	59
The like — — —	ib.
The like — — —	60
For a concilium — — —	63
... judgement on demurrer, &c. — — —	ib.
... a special jury — — —	65
.... view — — —	68
... costs for not proceeding to trial pursuant to notice — — —	71
	Nisi

CONTENTS

	vii Page
Nisi and absolute discharging the same —	71
... for judgement, as in the case of a non-suit — — — —	74
Discharging the same on a peremptory undertaking to try — — — —	ib.
Absolute for judgement, as in the case of a nonsuit, on hearing both parties —	75
The like, no case shewn — —	ib.
Nisi and absolute to set aside a nonsuit (or verdict) and for a new trial thereon —	79
Discharging a rule nisi to set aside a nonsuit (or verdict) with costs —	ib.
Nisi and absolute to arrest the judgement	85
..... retain the damages and costs in one action towards satisfaction of the debt and costs in another between the same parties — — —	88
To make an order of nisi prius a rule of court — — —	91
... enlarge the time for the arbitrator's making his award — —	93
... be present at taxing costs — —	97
Nisi and absolute to stay the proceedings against bail pending a writ of error —	99
For the marshal to acknowledge the defendant in his custody — —	103
To bring the defendant up to be discharged under the lords act, in the country —	105
A 4	The

	Page
The like in town — — —	106
To remand him till a future day thereon	ib.
... discharge him — — —	107
... bring the defendant up to assign his effects under the compulsive clause in the lords act — — —	115
For an attorney to answer the matters of complaint in an affidavit — — —	125
Enlarging the time to answer it — — —	ib.
Discharging it, on the attorney's paying certain costs — — —	ib.
To enter up judgement on an old warrant of attorney — — —	129

WITH

NOTES

ON EACH RULE.

NAMES

NAMES OF THE CASES CITED.

Such of the Cases in this Selection, the Names of which are printed
in *Italics*, are only the Compiler's own Notes.

				Page
A LCHIN against Wells,	—	—	—	14
Allen v. Griffiths,	—	—	—	28
Anderfon v. George	—	—	—	82
Baillie against Cazelet,	—	—	—	51
Bailly v. Wilkinfon,	—	—	—	77
Barker, widow, &c. v. Braham and another,	—	—	—	40
Baskerville v. Brown,	—	—	—	89
Belcher v. Gansell,	—	—	—	26
Bennett, administrator, &c. v. Coker,	—	—	—	26
Bevan v. Bevan,	—	—	—	7
Benwell v. Black,	—	—	—	102
<i>Bickley v. Tucker,</i>	—	—	—	111
Birt v. Barlow,	—	—	—	83
Bland v. Darley,	—	—	—	63
Bright, executor, &c. v. Eynon,	—	—	—	82
Brooke, Lord, v. Stone,	—	—	—	13
Brown v. Baskerville,	—	—	—	89
. . . . qui tam, v. Bailey,	—	—	—	62
Bruckshaw v. Hopkins,	—	—	—	32
Butt v. Mow,	—	—	—	101
Cameron et al. against Reynolds,	—	—	—	87, 128
Capron v. Archer,	—	—	—	100
				Carter

NAMES OF CASES.

	Page
Carter v. Roberts,	101
Cates, <i>who</i> , &c. v. Carrington,	61
..... Kemp,	61
..... Knight,	86
..... Marsh,	61
..... Mellish,	73, 86
..... Palmer,	77
..... Winder,	73, 81
Cavil v. Burnaford et al.	43
Cecil v. Briggess, bart.	36
Same v. Same,	36
Christie v. Richardson,	102
Cockran v. Robertson,	58
Cope and another v. Cooke,	7
Cox and another, executors, &c. v. Parry,	51
Crozier v. Storke,	55, 56
Davies against Cottle,	77
De Moranda and others v. Dunkin and others,	13
Edie and another against the East India Com- pany,	82
Edwards v. Blunt,	87
Entwistle and others v. Shepherd and others,	101
Evans v. Gilbert,	101
Fisher against Bull,	111
..... Stanhope,	104
Forbes v. Lord Middleton,	43, 64
Ford v. Gainer,	39
Foster v. Snow,	58
..... Taylor,	29
Fox v. Glafs,	43
Frost v. Woolcombe,	90

G ravett

NAMES OF CASES.

xi

Page

Gravett against Williams,	—	—	—	19
Griffith v. Walker,	—	—	—	32
Griffiths v. Williams,	—	—	—	49, 51
. Jones, on the demise of, v. Marsh,	—	—	—	5
Hall against Buchanan,	—	—	—	76
Hand v. Lady Dinely,	—	—	—	53
Hallett, esq; and others v. the East India Com- pany,	—	—	—	50
Hare v. Lloyd,	—	—	—	58
Harris, executor, &c. v. Jones,	—	—	—	26
Harrison v. Grote,	—	—	—	102
Hart, qui tam, v. Hawkins,	—	—	—	107
Hartley and others v. Bateson and others,	—	—	—	52
Heathfield v. Chilton,	—	—	—	7
Heyrick v. Foster,	—	—	—	56
Highnam and another, executors, &c. v. Hassell	—	—	—	96
Hill v. Bolt,	—	—	—	19
Hodson v. Richardson,	—	—	—	36
Holiday, et al. v. Colonel Pitt,	—	—	—	3
Holmes v. White,	—	—	—	23
Hutchins v. Hird,	—	—	—	15
Hutton and Wife v. Bolton,	—	—	—	50
Jacks v. Pemberton and another,	—	—	—	7
J'ans, qui tam, v. Hutton,	—	—	—	23
Jenkins v. Edwards,	—	—	—	56
Jennings, qui tam, v. Wilson and others,	—	—	—	78
Johnson v. Houlditch,	—	—	—	54
Jones v. Concannon,	—	—	—	78
Jupp, Doe ex dim. v. Andrews,	—	—	—	127
Kabell against Hudson,	—	—	—	51, 52, 53
Kempland v. Macauley and another,	—	—	—	101, 102
Kerthaw v. Cartwright and another,	—	—	—	101
+				King

			Page
King v. Pippett,	—	—	78
. . . . qui tam, v. Clifton,	—	—	49, 62
King, the, v. Adderley,	—	—	14, 15, 19
. Addington,	—	—	94
. Cotes,	—	—	13
. the Sheriff of Cornwall, in the cause of Daw and Smith,	—	—	12
. Franklin,	—	—	41
. Harris et al.	—	—	30
. Hart, esq;	—	—	67
. Holt,	—	—	80, 83
. Jones,	—	—	14, 39
. the Sheriff of Middlesex, in the cause of Robins v. Hall,	—	—	8, 16
. the like, Metcalfe v. Aylett,	—	—	16, 21
. Perry and others,	—	—	67
. Peters et al.	—	—	43
. Smithies,	—	—	5, 13, 17
. Wallace,	—	—	8, 17
. Wheeler,	—	—	96
. White and another,	—	—	87
Lakin against Dewall,	—	—	40
Law v. Smith,	—	—	101
. . . qui tam, v. Crowther,	—	—	56
Le Breton v. Braham,	—	—	50
Lench v. Pargiter,	—	—	109, 112
Levett v. Perry,	—	—	102
Lorymer v. Hollister,	—	—	11
Maclellan against Howard,	—	—	56
Malcolm and another, assignees, &c. v. Ful- larton,	—	—	54, 95
Marder v. Cox,	—	—	96
. . . . and Wife v. Lee,	—	—	129
			Masterman

NAMES OF CASES.

				xiii
				Page
Masterman v. Grant,	—	—	—	101
Maughan, qui tam, v. Walker,	—	—	—	61
<i>Merrick and another v. Holles,</i>	—	—	—	4
Mewburn v. Langley,	—	—	—	78
Mitchell v. Oldfield,	—	—	—	89, 90
Montpeffon v. Randle,	—	—	—	82
Morgan v. Luckup,	—	—	—	56
Munt and another v. Tremamondo,	—	—	—	78
Mylock v. Saladine,	—	—	—	29
Newton against Swymmer,	—	—	—	102
Owen against Hurd,	—	—	—	8
Pechey against Harrison,	—	—	—	86
Palmer v. Wadbrooke,	—	—	—	56
Pearse, esq; v. the Earl of Faulconberg and others,	—	—	—	69
Penny v. Harvey,	—	—	—	23
Petre v. White,	—	—	—	40
Petyt v. Berkley, esq;	—	—	—	29, 30
Phillips v. Biron, et al.	—	—	—	40
..... and others, Doe on the demise of, v. Moses,	—	—	—	76
Pitt v. Yalden,	—	—	—	127
Pochin v. Pawley,	—	—	—	80, 82
Pool v. Charnock,	—	—	—	101
Poole, the Mayor of. v. Bennet,	—	—	—	29
Read against Dupper,	—	—	—	90
Rice v. Shute,	—	—	—	80
Richardson v. Jelly,	—	—	—	101
Rogers v. Reeves,	—	—	—	11
Russell v. Stewart,	—	—	—	22
Shepherd against Charter,	—	—	—	46
Shortridge v. Hiern,	—	—	—	78
Smith v. Muller,	—	—	—	95
				Smith

				Page
Smith v. Painter,	—	—	—	40
..... Shepherd,	—	—	—	30
Stackey v. Peel,	—	—	—	18, 19
Stevenson v. Yorke,	—	—	—	53
Stodhart v. Johnson,	—	—	—	53
Sutton v. Bishop,	—	—	—	86
Swinglehurst v. Altham and another,	—	—	—	96
Symonds v. Parmenter and another,	—	—	—	26
Taylor against Whitehead,	—	—	—	87
Tomson v. Browne,	—	—	—	40
Todd v. Dodd,	—	—	—	130
Waddington against Thellwell, esq;	—	—	—	28
Watkins v. Towers and others	—	—	—	28, 32, 50
Watson, qui tam, v. Jackson and others,	—	—	—	77, 78
Webb v. Holt,	—	—	—	58
Welch v. Hole,	—	—	—	90
Weller v. Goyton and another,	—	—	—	78
<i>White v. Heard,</i>	—	—	—	110
Wills v. Crabb,	—	—	—	89
Wilson v. Rastall,	—	—	—	80
Wood v. Webb,	—	—	—	17
<i>Woolcombe v. Frost,</i>	—	—	—	7, 39, 54, 90
Worley v. Lee,	—	—	—	23

RULES IN PERSONAL ACTIONS

IN THE

KING'S BENCH.

(a) *Tuesday next after three Weeks
from Easter Day, in the 33d Year
of King George the Third.*

P. and another, } UPON reading the affi-
 (b) davit of the *defendant*,
D. (c) (1) It is ordered, that the
plaintiffs, upon notice of this rule to be given
to their attorney, shall, upon *Thursday next*
after three Weeks from Easter day, shew cause
why the *defendant* should not be discharged

Nisi, to dis-
charge a pri-
vileged person
on filing com-
mon bail.

(1) Of the facts.

(a) All rules are thus intitled, on the day they are made.

(b) The plaintiff's name always standing first in the
rule, the word "against" becomes useless, and is
omitted.

(c) In this Selection the letter "P." is in general used
for the plaintiff's name, and the letter "D." for the de-
fendant's.

B

out

RULES IN PERSONAL ACTIONS

out of the custody of *the sheriff of the county of Middlesex*, as to this action, upon filing common bail; and why the *plaintiffs* should not pay the costs of this application, to be taxed by the master—upon the motion of Mr. *Manley*.

By the Court (*d*).

(*d*) These words are signed by the clerk of the rules, on the right hand side of the foot of every rule.

Absolute
thereon.

P. and another, } UPON reading the rule
D. } made in this cause, on
Tuesday next after three weeks from Easter day
in this term, and upon hearing Mr. *Lambe*
of counsel for the *plaintiffs*, and Mr. *Erskine*
of counsel for the *defendant*; It is ordered, that
the *defendant* be discharged out of the custody
of *the sheriff of the county of Middlesex*, as to
this action, upon filing common bail; and
that so much of the said rule as relates to the
plaintiffs

IN THE KING'S BENCH.

plaintiffs paying the costs of this application
be discharged.

*I certify, that an appearance was entered
in the within-named cause, the 27th of
April 1793.*

Certificate of
the appear-
ance.

JOHN YATES, Dep. Phil.

IN cases where privileged persons* are arrested, it is a motion of course, on a short affidavit of the facts, for a rule nisi to discharge them; and in such of the cases as common bail is required on the discharge, a rule nisi to the above effect will be granted, which, whether cause be shewn or not, if it clearly appears that the party is intitled to privilege, will, either on shewing cause, or on an affidavit of the service of the rule nisi, if no cause is shewn, be made absolute, but not commonly with costs †.

As where one of his majesty's servants in ordinary, namely, the gentleman of the but-tery, had been arrested; on the motion of Mr.

* Sellon's Pr. 55. Tidd's Pr. 42. and Impey's Pr. 66.
2d ed.

† And see Holiday et al. v. Col. Pitt, 2 Stra. 985.

RULES IN PERSONAL ACTIONS

Manley, the above rule nisi was granted to discharge him; which was afterwards, on hearing Mr. Lambe against it, made absolute, but without costs, and the last of the above rules was drawn up thereon*.

So these rules may in like manner be obtained to discharge a defendant on his being arrested, where it appears from the affidavit to hold to bail that he is not liable to give special bail, or that the affidavit is defective†, as if the defendant be arrested in any of the other cases enumerated in the books of practice, where it is held he cannot legally be held to bail‡; or if the affidavit be not sufficiently positive, or does not shew a subsisting debt, or how it arose, or is inaccurate, or if separate actions are included in the same affidavit§.

When the absolute rule is drawn up, if common bail be required, it should be filed with the clerk of the common bails, if the action is by bill; but if by original, an appearance should be entered with the filazer, who will

* Merrick and another v. Holles, E. T. 33d Geo. III.

† 2d Wynne's Eunomus, 136, 2d ed.

‡ Sellon's Pr. 38. Tidd's Pr. 28. and Impey's Pr. 59, 2d ed.

§ Sellon's Pr. 110. Tidd's Pr. 39. and Impey's Pr. 68, 2d ed.

thereon

IN THE KING'S BENCH.

thereon give a certificate thereof, at the foot or on the back of the rule, to the above effect, and then a copy of the rule and certificate should be served at the sheriff's office, and the originals shewn at the time of the service; when directions will be given to the officer in whose custody the defendant may be, to discharge him accordingly.

The above rule nisi should be served as all other rules are that require service, and are not for the purpose of bringing the party into contempt in case of his disobedience to the rule, for these must be served on the party personally, and the original shewn to him at the time of the service *; but such of the rules in this Selection as are of the former description should be served on the attorney (in a town cause, but on the agent in a country one) of the adverse party, either by delivering a copy of it to him personally, or leaving it with his clerk or servant at his dwelling-house †, office, or chambers, and shewing the original to the person on whom it is served at the same time; or by leaving a copy of it at the last

* The King v. Smithies, 3 Term Rep. 351.

† Jones on the demise of Griffiths v. Marsh, 4 Term Rep. 464.

RULES IN PERSONAL ACTIONS

place entered in the alphabetical book kept at the master's office for entering the residence or place where attornies resident in town, or within ten miles of it, may be served with notices, fummonses, orders and rules. But if there be no such entry on the book, then the fixing up of the copy in the master's office is sufficient service*; and a board is put up against the side wall in the open part of the King's Bench office, adjoining the master's rooms, for the fixing up of the same.

Accordingly where an attorney had entered his place of residence in the book, and afterwards removed; and before he had altered the entry a demand of a plea, which required to be served on him as agent for the defendant, was stuck up in the office, instead of being left at the place entered in the book; and for want of a plea judgment was signed; and it being an action of debt on bond, a fieri facias was issued, and levied on the defendant's effects: the court, on the motion of Mr. Mingay, granted a rule nisi to set aside the proceedings with costs for this irregularity; and which afterwards, on

* Order H. T. 1768.

IN THE KING'S BENCH.

hearing Mr. Erskine against it, was made absolute*.

It may not be improper here to observe, that though where an affidavit is necessary in support of the motion for any of the rules in this Selection, it is in these notes recommended to be short; yet the writer only means that prolixity should be avoided: for as it is the rule of this court not to receive any supplementary affidavit †, care must be taken to insert every thing in it material to the point in question; but then, on the other hand, it should contain nothing more, and if it does not, it will in general be short.

The true place of abode and addition of the deponent must be inserted in the affidavit ‡, and the body of it should not only be accurately drawn, but the title at the head of it must be correct; for if the title be omitted, the affidavit cannot be read §, nor can the

* Woolcombe v. Frost, M. T. 27th Geo. III. See the rules, post.

† Heathfield v. Chilton, 4 Burr. 2015; Cope and another v. Cooke, Doug. 450; and Jacks v. Pemberton and another, 5 Term Rep. 552.

‡ Order M. T. 1663.

§ Bevan v. Bevan, 3 Term Rep. 601.

RULES IN PERSONAL ACTIONS

court take any notice of it, even though the adverse party should be willing to waive the objection*; accordingly where the affidavit was intitled improperly, the court held the proceedings founded on it irregular†; and it may be observed, that though an affidavit of the cause of action, before process sued out, in order to hold the defendant to bail, may be regularly sworn before a commissioner, although he be concerned as attorney for the plaintiff‡, yet no other affidavit can be sworn before the attorney for the party on whose behalf it is made; for if it is, it will be irregular§, and cannot be read||.

And now, if the affidavit be taken by a commissioner, and the person making it appears from his or her signature to be illiterate, the commissioner must state in the jurat, that "The affidavit was read in his presence to the party making the same, and that such

* Owen v. Hurd, 2 Term Rep. 643.

† The King v. the Sheriff of Middlesex, in the cause of Robins v. Hall, 3 Term Rep. 133.

‡ Order E. T. 1742.

§ Ibid.

|| The King v. Wallace, 3 Term Rep. 403.

party

IN THE KING'S BENCH.

party seemed perfectly to understand the same;
and also, that the said party wrote his or her
signature in the presence of the commissioner
taking the said affidavit *."

* Order E. T. 1791.

UPON

Nisi for an attorney to put in and perfect bail, pursuant to his undertaking.

(1) Of the facts.

P. } UPON reading the affidavit of *A. B.*
 D. } (1) It is ordered, that Mr. *E. F.* upon notice of this rule to be given to him or his agent, shall, upon *the morrow*, shew cause why he should not forthwith put in and perfect bail for the *defendant* on the writ of *alias testatum special capias* issued in this cause, pursuant to his undertaking—upon the motion of Mr. *Shepherd*.

Absolutethereon.

(1) Rule nisi.

(2) Of the service of the rule nisi.

P. } UPON reading the rule made in this
 D. } cause, on *Wednesday*, [Ec.] (1) the affidavit of *G. H.* (2) and upon hearing counsel as well for Mr. *E. F.* in the said rule named, as for the *plaintiff*; It is ordered, that the said Mr. *F.* do forthwith put in and perfect bail for the *defendant* on the writ of *alias testatum special capias*, issued in this cause, pursuant to his undertaking—upon the motion of Mr. *Shepherd* for the *plaintiff*, and Mr. *Erskine* for Mr. *F.*

IF an attorney undertake to put in bail for the defendant, the court will oblige him to fulfil

fulfil his undertaking, even though he may have been imposed upon by the bailiff*; and it is of course on the application of the *plaintiff* to compel him †. And the court will, on such an application, supported by a short affidavit of the facts, grant this rule nisi, and afterwards make it absolute on an affidavit of service, or upon shewing cause, if the fact of the undertaking be clear, and then the absolute rule thereon is drawn up to the above effect.

* *Lorymer v. Hollister*, 1 Stra. 693.

† *Rogers v. Reeves*, 1 Term Rep. 418.

RULES IN PERSONAL ACTIONS

To return the writ.

(1) Or "late."

(2) Or "lati-
talis, &c."

P. } IT is ordered, that the (1) *sheriff* of the
D. } *county of Surrey* shall, within *six* days
next after notice of this rule to be given to *his*
under-sheriff, peremptorily return the writ of
special capias (2) issued between the parties.

Side bar.

IF the sheriff does not return the writ without, which it is not customary to do, this rule may issue on the return day of the writ, by bill, and on the quarto die post by original; and to prevent delay it is usual then to obtain it, but the rule cannot regularly issue before*; and it may be had (like all other side-bar rules) of course at the clerk of the rules' office, without either a motion in court, or the signature of counsel.

This rule, as well as the subsequent one to bring in the body, being for the purpose of bringing the sheriff into contempt in case of his disobedience to the rule, it must either be served on the under-sheriff himself, or on the clerk or agent at the under-sheriff's office, and

* The King v. the Sheriff of Cornwall, in the cause of Daw and Smith, 1 Term Rep. 552.

service

IN THE KING'S BENCH.

Service of it on the under-sheriff's agent in town is not good service*, neither is it on one of the under-sheriff's domestics, as a maid servant†; and the original rule must be shewn at the time of the service‡.

In a town cause, *i. e.* on an arrest in London or Middlesex, this rule, as well as the one to bring in the body, is a four day rule§, exclusive of the day of the service||; but in a country cause, *i. e.* on an arrest in any other city or county than London or Middlesex, it is a six day rule, and the writ must now be actually returned on the day the rule expires; and in default thereof the plaintiff is at liberty to move for an attachment on the next day¶.

But the rule cannot regularly issue if the plaintiff has taken an assignment of the bail bond‡, nor if the sheriff appoint a special bailiff to execute it at the plaintiff's request**,

* The King v. Coles, Doug. 404.

† Loft, 301.

‡ The King v. Smithies, 3 Term Rep. 351.

§ Order T. T. 1766. See 3d Burr. 1921.

|| Loft, 631.

¶ Order M. T. 1791.

‡ Lord Brooke v. Stone, 1. Wil. 223. 4th ed.

** De Moranda and others v. Dunkin and others,

4 Term Rep. 119.

nor

RULES IN PERSONAL ACTIONS

nor if the sheriff has been out of office six months before the rule issues *, *i. e.* lunar months, and including the day he went out of office †, even though he has been requested within the six months, for he cannot be legally called on otherwise than by this rule ‡; and if the plaintiff should notwithstanding issue the rule, and obtain an attachment for not complying with it, the court will set such proceedings aside for irregularity, with costs. So it seems if the parties compromise the matter, and afterwards rule the sheriff to return the writ, the court will discharge the rule, and that with costs §.

* 20th Geo. II. c. 37. f. 2.

† The King v. Adderley, Doug. 446.

‡ The King v. Jones, 2 Term Rep. 1.

§ Alchin v. Wells, 5 Term Rep. 470.

P. } IT is ordered, that the (1) *sheriffs* of To bring in
 D. } *London* shall, within *four* days next af- the body.
 ter notice of this rule to be given to *their* (1) Or "late."
secondaries, peremptorily bring into court the
 body of the *defendant*.

Side bar.

WHEN the rule to return the writ is expired *, and the sheriff has returned a cepi corpus to the writ (for which return a search should previously be made on the file of writs of the term the writ is returnable, kept by the custos brevium in the treasury-chamber at Westminster hall;) and if bail should have been put in, an exception against them having been entered in the judge's or filazer's book, and notice thereof served; this rule may be had to compel the sheriff to bring in the body, although he may be out of office before the rule issues †, if it issue within six lunar months after he went out of office ‡.

* Hutchins v. Hird, 5 Term Rep. 479.

† Order T. T. 1791.

‡ See the King v. Adderley, Doug. 446.

UPON

For an attachment for not bringing in the body.

(1) The rule to bring in the body.

(2) Of the facts.

P. } UPON reading the rule made in this
D. } cause, on *Monday*, [Ec.] (1) and the affidavit of *A. B.* (2); It is ordered, that a writ of attachment issue against the *sheriffs of London*, for *their* contempt, in not bringing into court the *body* of the *defendant*, pursuant to the said rule—upon the motion of *Mr. Giles*.

WHEN the time for putting in and perfecting the bail, and the rule to bring in the body, are expired, and the bail have not justified, or the rule allowing them has not been served (for the sheriff is not discharged till the rule is served, though the plaintiff oppose the justification of the bail, who are allowed*, nor even if the defendant be dead, if he died after the expiration of the rule†) it is a motion of course for this rule, on a short affidavit of the facts; and so it is for a similar one

* The King v. the Sheriff of Middlesex, in the cause of Metcalfe v. Aylett, 4 Term Rep. 493.

† Same v. same, in the cause of Robins v. Hall, 3 Term Rep. 133.

for

for not returning the writ, if the sheriff does not return it agreeable to the rule, when the time for putting in and perfecting the bail is expired; and this is one of the rules that may be moved for on the last day of the term*.

The affidavit ought to state that the party called on by the rule was served with a copy of it *personally*, and that the original was shewn to him at the same time†; and the affidavit should not be sworn before the plaintiff's attorney or agent, for if it is the court will not receive it‡; and it must be intitled with the names of the parties in the cause, for affidavits and motions for attachments in civil suits are proceedings on the civil side of the court until the attachments issue: but as soon as the attachments issue the proceedings are on the crown side, and from that time the king must be named as the prosecutor§; therefore the rule for the attachment is drawn up by the clerk of the rules on the civil side, but the subsequent proceedings are transacted in the crown-office.

* 1 Burr. 651.

† The King v. Smithies, 3 Term Rep. 351.

‡ The King v. Wallace, *ibid.* 403.

§ Wood v. Webb, *ibid.* 253.

RULES IN PERSONAL ACTIONS

When the rule is drawn up, the plaintiff's attorney should take it to his clerk in court in the crown-office, who will immediately thereon make out the attachment, which, if the rule be against the late sheriff, is directed to the present one, but if it be against the present sheriff, the attachment is directed to the coroner; and it should then be lodged at the office of the present sheriff or coroner to whom the writ is directed, with the bill of the debt, *i. e.* the sum sworn to and costs*, including the costs of the attachment, with the sheriff or coroner's fee for executing it, as well as the costs in the original action: for the writ issues with costs, and is always so indorsed, and upon which, if there be no real defence to the action, the present sheriff or coroner, as the case may be, usually pays the money to the plaintiff's attorney on the return of the writ.

But if the defendant in the action has *merits*, and the bail justify before the money is paid, the court will, on a short affidavit of the facts, stay the proceedings against the sheriff on terms, and let in the defendant to try the action, if his attorney or agent swear in the affi-

* Stackey v. Peel, Tidd's Pr. 166.

davit

davit "That he believes the defendant has real
" merits, and a good defence to the action."

The terms, if the plaintiff has not lost a trial, *i. e.* the opportunity of trying his cause when he might have tried it had there been no default in putting in and perfecting the bail, are payment of the costs^{*}; but if the plaintiff has lost a trial, then the attachment remains as a security to the plaintiff for what he may recover[†], not exceeding the sum sworn to, inasmuch as the bail are not liable to more[§]; though if there should not be a defence to the action, yet the sheriff may, before the money is paid over to the plaintiff, apply to the court, on an affidavit of equitable circumstances, who it seems may thereon relieve him from part of the debt sworn to, by proportioning the fine to the actual damages^{||}.

* Hill v. Bolt, 4 Term Rep. 352.

† Gravett v. Williams, cited in Hill v. Bolt.

§ Stackey v. Peel. Tidd's Pr. 166.

|| The King v. Adderley, Doug. 446.

Allowing bail,

P. } UPON reading the affidavit of *A. B.*
 D. } it is ordered, that the bail put in for
 the *defendant*, who have this day justified them-
 selves in court, be allowed, and the bail-piece
 filed—upon the motion of Mr. *Baldwin*.

THE motion to justify the bail is of course on an affidavit of the service of the notice of justification, and on the bail's swearing, "That they are housekeepers, and are worth double the sum sworn to after payment of all their debts;" and they will thereupon be *allowed*, unless, upon an opposition to them by counsel before they do justify, either one or both should be *rejected* by the court, on account of any irregularity in the notice, or for any of the causes which render them objectionable, most of which are particularized in the books of practice* ; and as soon as the bail have justified, the rule allowing them, which is drawn up thereon to the above

* Sellon, 169; and Tidd, 139.

effect,

effect, should be got from the clerk of the rules' office, and *served* without delay; as until it is served the sheriff is not discharged, and of course an attachment may issue against him on the expiration of the rule to bring in the body, and the time allowed for putting in and perfecting the bail*.

* The King v. the Sheriff of Middlesex, in the cause of Metcalfe v. Aylett, 4 Term Rep. 493.

RULES IN PERSONAL ACTIONS

For time to declare.

P. } IT is ordered, that the *plaintiff* have
D. } time to declare until the first day, inclusive, of the next term, if the *defendant* is not in custody.

Side bar.

For further time to declare.

P. } IT is ordered, that the *plaintiff* have
D. } further time to declare, until the last day, inclusive, of this term, if the *defendant* is not in custody.

Side bar.

For the plaintiff peremptorily to declare.

(1) The last rule.

P. } UPON reading the rule made in this
D. } cause, on *Tuesday*, [Etc.] (1) it is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, shall peremptorily declare in this cause, on or before the last day of this term; otherwise let a nonprofs be entered—upon the motion of Mr. *Const.*

IF the defendant be in custody, the plaintiff must declare against him before the end of the second term *, *i. e.* the term next after

* Order T. T. 1716; and *Russell v. Stewart*, 3 Burr. 1787.
the

the return of the writ; but if he is not, and the plaintiff should not be ready to declare in the course of that time, in order to prevent the defendant from signing a nonprofs, which he otherwise may for want of a declaration *, supposing he appears the term the writ is returnable †, the rule for time to declare may be taken out of course; and if the defendant has appeared, a copy of it should be served ‡ on his attorney before the expiration of the time to declare; but if he has not, then the copy should be stuck up on the board fixed up for that purpose against the outside of the master's room in the King's Bench Office. But if the defendant does not sign the nonprofs, the plaintiff is at liberty to declare, without the aid of this rule, at any time within a year from the return of the writ §.

If the plaintiff should not be prepared to declare within the time allowed by the first rule, the above rule for *further time* may also be taken out of course; but which should be

* 13 Cha. II. st. 2. c. 2. sec. 3.

† Ibid. and Holmes v. White, Tidd's Pr. 236.

‡ Jans qui tam v. Hutton, 1 Sir W. Black. 290.

§ Worley v. Lee, 2 Term Rep. 112; and Penny v. Harvey, 3 Term Rep. 123.

RULES IN PERSONAL ACTIONS

taken out, and the copy served or stuck up in the office, within the time allowed by the former rule, and which may be renewed in like manner of course, from time to time, *i. e.* from the commencement to the end of one term, and from the end of that term to the commencement of the next, and so on, as often as there may be occasion, unless the defendant should chuse to make the rule peremptory, which he may do on receipt of the *second rule*.

And if the defendant should be inclined to compel the plaintiff either to declare or drop the action, on the receipt of the copy of the second or any subsequent rule for time to declare, he may move to make the last rule *peremptory*, which is a motion of course, without any affidavit in support of it, annexing an office copy of the last rule (which should be previously got from the clerk of the rules' office) to the instructions to counsel to move: and thereupon the above rule is drawn up, which should of course be served; and then, if the plaintiff do not declare within the time specified in the rule, the defendant is at liberty to sign a nonpross for want of a declaration.

IT

P. } IT is ordered, that upon payment of To discontinue
D. } costs, to be taxed by the master, the on payment of
costs.
action be discontinued.

Side bar.

I appoint 7th Dec.
at eleven o'clock.

For costs, 2*l.* 14*s.*

E. Benton.

Appointment
and allocatur.

E. Benton.

P. } IT is ordered, that upon The like as to
D. and another. } payment of costs, to be one defendant.
taxed by the master, the action be discontinued, as to the *defendant D.*

Side bar.

IF, at the expiration of the time allowed for declaring, the plaintiff should find it advisable not to proceed further in the action, he may either suffer a nonpross to be signed, or (which is most prudent) his attorney may take out this rule to *discontinue* the action, which, in common cases, is conditional, being on payment of costs ; but, in particular cases, leave may be obtained to discontinue without payment

RULES IN PERSONAL ACTIONS

payment of costs; as, where it appeared an administrator had *not* knowingly brought the action wrong, the court gave him leave to discontinue without payment of costs, on his consenting not to bring a new action without leave of the court *; though where it appeared an executor *had* knowingly brought his action wrong, the court refused him such leave †.

As the plaintiff is at liberty to discontinue the action against all the defendants, where there are several, so he may against *either* of them, and take out the above rule for that purpose; and the rule to discontinue may, in general, be regularly taken out by the plaintiff, if he should not think fit to proceed further in any of the early stages of the cause, but not after the action has been decided ‡; and if improperly obtained, it will be discharged on motion §.

When the rule to discontinue on payment of costs is obtained, it should be taken to the

* Bennet, administrator, v. Coker, 4 Burr. 1927.

† Harris, executor, v. Jones, 3 Burr. 1451; and 1 Sir W. Black. 451. S. C.

‡ And see Tidd's Pr. 421.

§ Symonds v. Parmenter and Barrow, 1 Wil. 86; and Belcher v. Gansell, 4 Burr. 2502.

master's

master's office, for his appointment to tax the costs; which his clerk will give at the foot of the rule, as above; a copy of it should then be served at the defendant's attorney's, and the appointment attended, when the master will tax the costs (as the first appointment must be now attended *) and give his allocatur of the same to the above effect: and as the rule is conditional, the taxed costs should then be immediately paid; for in default of it the defendant is at liberty to proceed on as if no rule had been taken out.

* Order H. T. 32d Geo. III.

UPON

To change the
venue.

(1) Of the facts.

P. } UPON reading the affidavit of the
D. } *defendant*, (1) it is ordered, that the
action be laid in the county of *Surrey*—upon
the motion of Mr. *Baldwin*.

IF, in the transitory actions where the court permit the venue to be changed of course, which may be found collected in the books of practice *, the plaintiff does not lay the venue in the county or city where the cause of action arose, and the defendant is inclined to remove it thither, this rule may be obtained for that purpose, on an affidavit † “That the cause of action (if any) arose *wholly* “in the county or city to which the venue is “applied to be changed, and not elsewhere out “of such county or city ‡;” but not, it seems, if the cause of action arose in a city or county where the justices of assize do not regularly go every circuit §: though, if it appear to the

* Sellon, 261. Tidd, 354; and Impey, 165. 3d ed.

† Orders M. T. 1654. f. 5.

‡ Waddington v. Thellwell, esq; 4 Burr. 2450; Watkins v. Towers and others, 2 Term Rep. 275; and Allen v. Griffiths, 3 Term Rep. 495.

§ Sellon, 272; and Tidd, 362.

court that there cannot be a fair and satisfactory trial in the county or city to which the venue is changed, they will discharge the rule to change the venue *.

And, in particular cases, where it is not of course to change the venue, if there is a probable ground to apprehend a fair, impartial, or satisfactory trial cannot be had where the venue is laid, the court will, on an affidavit of the circumstances, grant a rule nisi, and afterwards either on an affidavit of the service, or on shewing cause, if it is opposed, make it absolute, to change the venue †. So if it appear that both the plaintiff's and defendant's witnesses live in the county or city to which the venue is moved to be changed ‡; and if it plainly appear to the court that the matter cannot be fairly and impartially tried in the proper county, they will give leave to enter a suggestion of the facts on the roll, and

* Petyt v. Berkeley, esq; Cowp. 510.

† The Mayor of Poole v. Bennet, 2 Stra. 874; Mylock v. Saladine, 3 Burr. 1564; and 1 Sir W. Black. 480. S. C.

‡ Foster v. Taylor, 1 Term Rep. 781.

award

RULES IN PERSONAL ACTIONS

award the venire to the next or another county*.

The motion to change the venue, however, cannot be made before the defendant has appeared; for, until appearance, the defendant is not in a situation to make any application †; and it should be made before plea ‡, though it may be made after an order for time to plead §; but not if it be to take short notice of trial for the first sittings in London or Middlesex, because there a trial would be lost §.

* *Rex v. Harris et al.* 3 Burr. 1330; and 3 Black. Com. 294. 7th ed.

† *Smith v. Shepherd*, 5 Term Rep. 9.

‡ *Orders M. T.* 1654. f. 5.

§ *Ford v. Gainer, Sayer*, 207.

§ *Petyt v. Berkeley, esq; Cowp.* 510.

UPON

P. } UPON reading the rule made in this
 D. } cause, on *Friday*, [Ec.] (1) and
 upon the undertaking of the *plaintiff* to give
 material evidence on the trial of this cause, of
 some matter in issue arising in the *city of Lon-*
don, where the cause of action was first laid;
 It is ordered, that the said rule be discharged
 —upon the motion of Mr. *Marryat*.

To bring back
 the venue.

(1) The rule to
 change the
 venue.

IT often happens that the venue in transi-
 tory actions is not laid where the cause of
 action really arose; and then in such of them
 as the venue is permitted to be changed in, of
 course the defendant will frequently obtain the
 preceding rule to change the same; upon which
 it is usual for the plaintiff to move to bring
 the venue back, on an *undertaking* to give
 material evidence on the trial, of some matter
 arising where the venue was first laid, and
 upon which this rule is made.

But it does not seem prudent for the
 plaintiff to enter into this undertaking, un-
 less he has some material evidence to give in
 support of it; for if he has not, he must be

RULES IN PERSONAL ACTIONS

non-suited on the trial * ; but proving a rule of court in Middlesex, for the defendant to pay money into court, has been held a sufficient compliance with an undertaking to give material evidence in Middlesex, because it is an admission of the cause of action †. And it seems that in an action against a sheriff for a false return, proof of the delivery of the writ to the defendant, and of his returning it in the county where the venue was laid, is sufficient to support an undertaking to give material evidence in that county ‡.

The motion for this rule is, of course, on the above undertaking, without any affidavit whatever ; and the rule may be obtained in almost any stage of the cause, even after it has been down to trial, and the plaintiff non-suited, and the nonsuit set aside ; and though the cause has been down a second time thereon, and then made a remanet for want of jurors §.

* Bruckshaw v. Hopkins, Cowp. 409.

† Watkins v. Towers and others, 2 Term Rep. 275.

‡ Griffith v. Walker, Sayer, 54.

§ Bruckshaw v. Hopkins, ut sup.

P. D. } IT is ordered, that the *plaintiff*,
 Same C. } upon notice of this rule to be
 Same E. } given to *his* attorney, shall, upon
 Same F. } *the morrow*, shew cause why, upon
 the submission of the defendants C. E. and F.
 to be bound and concluded in the actions
 brought against them by the fate of such ver-
 dict as shall be found against the *defendant*
D. or such other action as the said *plaintiff*
 shall chuse to try, all further proceedings in
 the said *three* other actions should not be stay-
 ed, until this court shall otherwise order; and
 if a verdict shall be given in favour of the
plaintiff in such action as shall be tried, to the
 satisfaction of the Lord Chief Justice, or other
 Judge before whom the said cause shall be
 tried, that then no writ of error shall be
 brought upon the judgement to be entered
 up, on the said verdict; nor shall any bill in
 equity be filed for relief against the same;
 and that in the mean time further pro-
 ceedings in these causes be stayed—upon the
 motion of Mr. *Park*.

Nisi to consoli-
date.

D

UPON

Absolute there-
on.

(1) The rule
nisi.

(2) Of the ser-
vice of the rule
nisi.

P. D. } UPON reading the rule made in
Same C. } these causes, on *Friday*, [*&c.*]
Same E. } in this term (1), the affidavit of
Same F. } G. H. (2) and no cause being
shewn to the contrary; It is ordered, upon the
submission of the defendants *C. E.* and *F.* to
be bound and concluded in the actions brought
against them by the fate of such verdict as
shall be found against the *defendant D.* or
such other action as the *plaintiff* shall chuse to
try, that all further proceedings in the said
three other actions be stayed, until this court
shall otherwise order; and if a verdict shall be
given in favour of the *plaintiff* in such action
as shall be tried, to the satisfaction of the Lord
Chief Justice, or other Judge before whom
the said cause shall be tried, that then no writ
of error shall be brought upon the judge-
ment to be entered up, on such verdict; nor
shall any bill in equity be filed, for relief against
the same—upon the motion of *Mr. Park.*

FORMERLY, if the underwriters re-
fused payment of a loss claimed by the in-
sured,

fured, under a policy of insurance, it was usual for the latter to bring a separate action against *each* of the former, and to proceed to trial in *all* the actions*; though now the defendants, after they have appeared (but not before, as until appearance they are not in a situation to make any application, as we have already observed †) may apply to the court for the above rule nisi to *consolidate* the actions; the motion for which is of course without any affidavit in support of the application, and it will afterwards be made absolute on the terms stated in the rule, whether cause be shewn or not; and if no cause be shewn, the above absolute rule is drawn up thereon: but it seems it may be made part of the rule, that the defendants shall produce all *books* and *papers* material to the point in issue ‡.

And it may be observed, that the consent of the defendants in the action consolidated, to be bound by the verdict in the action to be tried, means a verdict to the satisfaction of the

* Park on Insurances, introd. 44. 2d ed.

† See p. 30, ante.

‡ Park on Insurances, introd. 45. 2d ed.

RULES IN PERSONAL ACTIONS

court *, or, in other words, such a one as the court shall think ought to stand as a *final* determination of the matter †. And if two actions of the same nature are brought by the plaintiff at the same time, the court will, on motion, after a rule to shew cause, direct them to be consolidated, and the plaintiff to pay the costs of the application ‡: indeed the plaintiff, in such a case, seems liable to an action upon the case for splitting his cause of action §.

* Loft, 147.

† Hodson v. Richardson, 3 Burr. 1477.

‡ Cecil v. Brigges, bart.; and same v. same,

2 Term Rep. 639.

§ 3 Morgan's Vade Mecum, 400.

UPON

P. } UPON reading the *affidavit of A. B.*
 D. } *gentleman, and another, and the affidavit*
of the defendant, (1) It is ordered, that the
plaintiff, upon notice of this rule to be given
to him or his agent, (2) shall, upon Tuesday,
[&c.] shew cause why the judgement signed
in this cause, and the writ of fieri facias issued
and executed thereon, should not be set aside,
with costs, for irregularity; and why the money
levied on the goods and chattels of the said de-
fendant by the sheriff of the county of Devon, by
virtue of the said writ, should not be restored
to the said defendant; and that in the mean time
the money shall remain in the hands of the said
sheriff—upon the motion of Mr. Mingay.

Nisi to set aside
 a judgement,
 and execution levied thereon,
 with costs, for
 irregularity.

(1) The affidavits of the facts.

(2) Being an attorney.

P. } UPON reading the rule made in this
 D. } cause, on *Monday, [&c.] (1), the affidavit*
of the plaintiff and another, the affidavit of
C. E. and another, (2) and upon hearing coun-
sel for both parties; It is ordered, that the judge-
ment signed in this cause, and the writ of fieri
facias issued and executed thereon, be set aside,

Absolute thereon.

(1) The rule nisi.

(2) The affidavits on the part of the plaintiff, as to the facts.

D 3

with

RULES IN PERSONAL ACTIONS

with costs, for irregularity; and that the money levied on the goods and chattels of the said *defendant*, by the *sheriff of the county of Devon*, by virtue of the said writ, be restored to the said *defendant*. And it is referred to the master to tax the said *defendant* his said costs, together with the costs of this application; which costs, when taxed, shall be paid by the *plaintiff* to the said *defendant*, or his attorney—upon the motion of Mr. *Erskine* for the *plaintiff*, and Mr. *Mingay* for the *defendant*.

Appointment
and allocatur.

I appoint 23^d Jan.
at six o'clock.
E. Benton.

For costs, 16 l. 10s.
E. Benton.

IF any *irregularity* occurs in the course of the proceedings in a cause, the opposite party may, on a short affidavit of the facts, apply for and obtain a rule nisi of the above nature, to set the proceedings aside for such irregularity, and commonly with costs; for it is a general rule, that when proceedings are set aside for irregularity,

larity, it is *with costs*; to which there seems to be but one exception, and that is, where the point in question has never been *settled* before*. And the rule nisi will afterwards, on an affidavit of the service, if it is not opposed, or on hearing both parties if it is, be made absolute, when the rule thereon will be drawn up after the above manner.

Upon which, if the rule nisi be made absolute (as here, it being a clear irregularity, as may be seen by the case which we have already mentioned †) with costs, the appointment to tax them should be got from the master's clerk, at the foot of the rule, as above ‡, and served, and attended with a bill of the costs, which the master will then *tax*, whether the adverse party's attorney attends or not, the first appointment being now to be attended §, and give his allocatur for the same to the above effect; and then, if they are not paid on demand, the party will subject himself to an *attachment* for the non-payment of

* The King v. Jones, 2 Term Rep. 1.

† Woolcombe v. Frost, p. 6, ante.

‡ See p. 26, ante.

§ See p. 27, ante.

RULES IN PERSONAL ACTIONS

them *. And it may be observed, that if an execution has been issued and levied under an *irregular* judgement, as here, when the rule is made absolute for setting the proceedings aside, the party prevailing may, for the injury he may thereby have sustained, bring an action of trespass against his *adversary* †, as well as the *attorney* ‡.

And as to the time of applying to set aside the proceedings, it seems, that if the irregularity be in the omission of the name in the writ, the proceedings may be set aside at any time §. So if the affidavit of the service of the writ be defective ||. But the general rule is, that the party must apply *without delay* ¶, *i. e.* as soon as he has an opportunity †; for an irregularity must be taken advantage of in its proper season, otherwise no advantage can be taken of it after-

* And see Tidd's Pr. 266.

† Phillips v. Biron et al. 1 Stra. 509.

‡ Barker, widow, v. Braham and Norwood, 3 Wil. 368, 4th ed.

§ Tomson v. Browne, And. 16.

|| Lakin v. Dewall, Sellon's Pr. in notes, 105.

¶ Petre v. White, 3 Term Rep. 5.

‡ Smith v. Painter, 2 Term Rep. 719,

wards,

wards *, and therefore it should be the *first* opportunity; though it seems the party may wait till his adversary shews he means to make use of the irregularity †. But if he goes on as if no irregularity had happened, the proceedings will not afterwards be set aside ‡, for he thereby *waives* the irregularity.

* The King v. Franklin, cited in the King v. Perry and two others. 5 Term Rep. 453.

† Loft, 333.

‡ Ibid. 236.

UPON

RULES IN PERSONAL ACTIONS

To set aside a regular interlocutory judgement, and subsequent proceedings thereon, upon payment of costs.

(1) The defendant's attorney's affidavit of the facts.

P. } UPON reading the affidavit of *A. B.*
D. } *gentleman*, (1) It is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, shall, upon *the morrow*, shew cause why the interlocutory judgement signed in this cause, and the subsequent proceedings had thereon, should not be set aside, upon payment of costs, and that in the mean time proceedings be stayed—upon the motion of Mr. *Dampier*.

Absolute thereon.

(1) The rule nisi.

(2) The plaintiff's attorney's affidavit of the facts.

P. } UPON reading the rule made in this
D. } cause, on *Tuesday*, [*&c.*] (1) *the affidavit of C. E. gentleman*, (2) and upon hearing Mr. *Lens* of counsel for the *plaintiff*, and Mr. *Dampier* of counsel for the *defendant*; It is ordered, upon payment of costs, to be taxed by the master, that the interlocutory judgement signed in this cause, and the subsequent proceedings had thereon, be set aside.

Appointment and allocatur.

I appoint 13 *Feb.*
eleven o'clock.

E. Benton.

For costs, 4*l.* 15*s.* 8*d.*
E. Benton.

IN some cases *regular* proceedings may be set aside, as here, where the defendant would otherwise be deprived of the opportunity of making his defence to the action; but it is always upon the terms of putting the plaintiff in as good a condition *as he was before**; for if that cannot be done, the court will not take an advantage from him which he has regularly obtained; consequently the defendant must apply in the *first* instance, and before the plaintiff has lost a trial.

Therefore, where the defendant has a defence which he means to try the merits of, though by some accident he lets the plaintiff sign judgment for want of a plea, but applies to set it aside as early as he receives notice of such proceeding, the court will let him in to try the *merits*†, upon his paying the costs, and will grant the above rule nisi thereon.

The application for it, however, must be grounded on an affidavit of his attorney or

* Fox v. Glas, 2 Stra. 823.

† Ibid. and Forbes v. Lord Middleton, *ibid.* 1242; and Rex v. Peters et al. or Cayil v. Burnasford, et al. 1 Burr. 568.

agent,

RULES IN PERSONAL ACTIONS

agent, shortly stating the proceedings, and that the defendant has merits; but the particular merits need not be stated, as the deponent's swearing generally, which he must do, "That he believes the defendant has real merits, and a good defence to the action," will be sufficient.

And the court will afterwards, on an affidavit of service of the rule nisi, if it is not opposed, or on hearing the plaintiff, if he opposes it by shewing cause, make it absolute, and the above rule will be drawn up thereon. But the rule being conditional, *i. e. on payment of costs*, it must be drawn up immediately, and the above appointment got thereon from the master's clerk *, to tax the costs; when the master will tax the same on the first appointment now †, and give his allocatur for them as above, and they must *then* be paid; for otherwise the plaintiff may proceed on upon his judgement, and the defendant will lose the benefit of the rule.

* See p. 26, ante.

† See p. 27, ante.

P. } IT is ordered, that the *defendant*, upon
 D. } notice of this rule to be given to *him*,
 or *his* attorney, shall peremptorily, on *the*
morrow, shew cause why it should not be re-
 ferred to the master, to see what is due for
 principal and interest on the *note of hand*
 (1) for which this action is brought; and also
 to tax the *plaintiff* *his* costs: and why the said
plaintiff should not be at liberty to sign final
 judgement thereon, without executing a writ of
 inquiry of damages—upon the motion of Mr.
Bayley.

Nisi to refer it
 to the master to
 calculate the
 principal and
 interest on a note
 of hand, and for
 the plaintiff to
 be at liberty to
 sign final judge-
 ment thereon
 without execut-
 ing a writ of in-
 quiry of da-
 mages.

(1) Or "bill of
 exchange."

P. } UPON reading the rule made in this
 D. } cause, *yesterday*, (1) the affidavit of
A. B. (2) and no cause being shewn to the
 contrary; It is ordered, that it be referred to
 the master, to see what is due for principal
 and interest on the *note of hand* for which this
 action is brought; and also to tax the *plaintiff*
his costs: and that the said *plaintiff* be at li-
 berty to sign final judgement thereon, without
 executing a writ of inquiry of damages—upon
 the motion of Mr. *Bayley*.

Absolute there-
 on.

(1) The rule
 nisi.

(2) Of the ser-
 vice of the rule
 nisi.

I appoint 27th *June*,
twelve o'clock.

R. Forster.

Appointment.

WHEN

WHEN the plaintiff has obtained an interlocutory judgement, in actions of assumpsit on *bills of exchange* or *promissory notes*, the court will refer it to the master, to see what is due for principal and interest, and give the plaintiff leave to sign the final judgement thereon *without* executing a writ of inquiry *; which may frequently save the plaintiff *a term*, where the defendant's object is delay: and it is now a motion of course for the above rule nisi, without any affidavit of the facts, and which will afterwards be made absolute on an affidavit of service, and the above rule absolute will be then drawn up thereon.

These rules, dispensing with the writ of inquiry, having introduced a *new practice* in this stage of these actions, it may not be useless to observe, that the mode of proceeding on the rule absolute is for the plaintiff's attorney to get an *appointment* at the foot of the rule from the master's clerk †, which he will give in the usual way, after the above manner, and then to serve it, and attend the same, with the notes or bills on which the action is

* *Shepherd v. Charter*, 4 Term Rep. 275.

† See p. 26, ante.

brought,

IN THE KING'S BENCH.

47

brought, and a calculation of the interest, and also an incipitur of the final judgement, on a *double half-crown* stamp*, being the final judgement paper; and the master will then, whether the defendant's attorney attends or not, as the first appointment is now to be attended †, *tax* the costs, and *sign* the final judgement, by giving his *allocatur* thereon in this manner:

	£.	s.	d.
For principal and interest -	101	1	7
For costs - - - -	19	18	5
	£. 121	—	—

R. Forster,
27th June 1795.

* 5 Will. III. c. 21. 2s. 6d.; and 9 and 10 Will. III. c. 25. 2s. 6d.

† See p. 27, ante.

RULES IN PERSONAL ACTIONS

To pay money
into court.

P. } IT is ordered, that the *defendant* have
D. } leave to bring into court *twenty pounds*;
and thereupon, unless the *plaintiff* shall accept
thereof, with costs, to be taxed by the master,
in full discharge of this suit, the said *twenty pounds*
shall be struck out of the declaration, and paid
out of court, to the *plaintiff*, or *his* attorney;
and upon the trial of the issue the *plaintiff* shall
not be permitted to give evidence for the said
twenty pounds—upon the motion of Mr. *Shepherd*.

Appointment
and allocatur.

I appoint 10 *June*,
six o'clock.

For costs, 6*l.* 3*s.* 6*d.*

R. Forster.

R. Forster.

IF, in the actions wherein the defendant
may pay money into court, which may be
seen in the books of practice *, the dispute is
not whether any thing, but *how much*, is due
to the plaintiff, this rule may be had to ena-
ble the defendant to offer the plaintiff, by pay-
ing it into court, such sum as he *acknowledges*
to be *due* to him, in full discharge of the action;
and the rule may be obtained at any time after
appearance (but not before, as until then the
defendant is not in a situation to make any

* Sellon, 308. Tidd, 408; and Impey 185, 3d ed.
application;

application *;) and before plea, and even after, on obtaining a judge's order for that purpose, † which is made on payment of costs.

The motion for the rule is of course, without any affidavit in support of it ‡: but before it can be drawn up, the money must be paid to the signer of the writs, who is the officer that now receives it; and his receipt for the money must be taken to the clerk of the rules, with the signature of counsel to the instructions to move for leave to pay it in, for (like most of the other *common* rules, the motions for which are of course in the *first* instance) it need not be moved; and thereupon the rule is drawn up.

The general rule, as to paying money into court, is, that when the demand is for a sum certain, or capable of being ascertained by mere computation, *without* leaving any sort of discretion to the jury, the court will permit the money to be paid in, even upon particular counts: but it seems the court will thereon compel the defendant to consent to such terms being made part of the rule, as the justice of

* See p. 30, ante.

† Griffiths v. Williams, 1 Term Rep. 710.

‡ And see 3 Black. Com. 304, 7th ed.; and King, *qui tam*, v. Clifton, 5 Term Rep. 257.

RULES IN PERSONAL ACTIONS

the case may require, as an inspection of *books* and *papers*, &c. *

And in order to see what in particular the plaintiff claims, where it does not appear by the declaration, and be thereby enabled to know whether it can be so ascertained or not, the defendant's attorney may, upon a summons, obtain a judge's order "for the plaintiff's attorney to deliver him the *particulars* in writing of the plaintiff's demand, for which the action is brought, and to stay the proceedings in the mean time:" indeed it has been said, that in *all* cases the plaintiff ought to give the defendant an account of the particulars of his demand †. But in practice this is esteemed to mean *only* where the particulars do not sufficiently appear on the face of the declaration, as in actions for goods sold and delivered, &c.

It has been held that the rule is an admission of the cause of action stated in the declaration ‡, and that the plaintiff is entitled to maintain the action *to the amount of the sum*

* Hallett, esq. and others v. the East India Company, 2 Burr. 1120; and see Hutton and wife v. Bolton, cited in Clay v. Willan and others, 1 Com. Pleas, Term Rep. 298.

† Le Breton v. Braham, 3 Burr. 1389.

‡ Watkins v. Towers and others, 2 Term Rep. 275.

paid

paid in; but that it admits nothing more, and therefore does not preclude the defendant from taking any objection to the action beyond that sum, even though, unless such sum were paid in, the objection would be a bar to the whole demand*.

And should the defendant obtain the rule, and under it pay money into court, in an action where the court do *not* permit money to be paid in, the rule may, on motion, after a rule to shew cause, be *discharged* for irregularity; but taking the money out of court is a *waiver* of the irregularity, and the plaintiff cannot afterwards have a verdict, unless he recover more than the sum paid in†.

If, on the money's being paid into court, the plaintiff choose to accept it in full discharge of the action, he is entitled to his *whole* costs up to that time, except the money be paid in on particular counts, for then he is only entitled to the costs of *such* counts‡; but if he proceeds after the money is paid in, and then before trial accepts it, which he may do§, he must

* Cox and another, executors of Shultz, v. Parry, 1 Term Rep. 464.

† Griffiths v. Williams, *ibid.* 710.

‡ Baillie v. Cazelet, 4 Term Rep. 579.

§ Kabell v. Hudson, *ibid.* 10.

RULES IN PERSONAL ACTIONS

pay the defendant his costs of the *subsequent* proceedings*.

When the plaintiff elects to take the money paid into court in full *discharge* of the action, his attorney must get an office copy of the defendant's rule to pay the money into court from the clerk of the rules, and take it to the signer of the writs, who will thereon give him a check on his banker for the money, on the attorney's signing a receipt for it in the book kept for that purpose; but he will not pay it to the attorney's clerk, or any other person than the *plaintiff* himself or his *attorney*, to whom the rule directs it to be paid.

The above appointment to tax the costs should then be got in the usual way†, from the master's clerk, on the office copy of the rule, and served at the defendant's attorney's‡, which should of course be attended by the plaintiff's attorney or his clerk, with a bill of the costs, when the master will *tax* the same, on the first appointment||, and give his *allocatur* thereon as above; and if the defendant does not *then* pay them,

* Hartley and others v. Batefon and others, 1 Term Rep. 629.

† See p. 26, ante.

‡ Kabell v. Hudson, 4 Term Rep. 10.

|| See p. 27, ante.

IN THE KING'S BENCH.

the plaintiff may proceed as if no money had been paid in, and go on to trial, and take a verdict, even though he does not make out his demand so much as the defendant has paid in *.

But if the plaintiff does not choose to accept the money in full discharge of the action, yet he may take it out, and proceed on for further damages, but that is at his *own peril*; for if he proceeds to trial, and does not prove *more* due than is paid into court, he must be nonsuited†, and pay the defendant *all* his costs‡: so he must if the defendant obtain a verdict §; and if a juror is withdrawn on the trial, he will not be entitled to *any* costs, not even up to the time of paying the money in ||.

However, in either of the cases, the plaintiff has a right to all the money paid into court, and it will be paid him at any time (unless, indeed, where the defendant is intitled to any *subsequent* costs ¶, and before the plaintiff receives the money, the court should, upon the defendant's application, order it to be *set off* against his costs, or direct them to be paid *out of*

* Hand v. Lady Dineley, 2 Stra. 1220.

† 3 Black. Com. 304, 7th ed.

‡ Kabell v. Hudson, 4 Term Rep. 10.

§ Stevenson v. Yorke, *ibid*.

|| Stodhart v. Johnson, 3 Term Rep. 657.

¶ See p. 51, ante.

RULES IN PERSONAL ACTIONS

it*); for by paying the money in, the defendant has *acknowledged* it to be the plaintiff's due †, and he can never recover it back again, though it afterwards appear that he paid it wrongfully ‡.

But it seems the court will permit the money to be brought in *without* costs, and very likely make the plaintiff pay all the costs, if the action appears to be brought and kept on foot *oppressively*, as where the plaintiff kept out of the way to prevent a tender; and his attorney, on a judge's summons to stay the proceedings, on payment of the debt and costs, pretended that the plaintiff had other demands§.

* See p. 89, post.

† 3 Black. Com. 304, 7th ed.

‡ Malcolm and another, assignees, &c. v. Fullarton,
2 Term Rep. 645.

§ Johnson v. Houlditch, 1 Burr. 578.

P. } IT is ordered that the *defendant* have
 D. } leave to plead several matters, to wit,
 that *he* did not undertake, and that *he* did not
 undertake at any time within six years next
 before the *exhibiting the bill* of the *plaintiff*—
 upon the motion of Mr. *Shepherd*.

For leave to
 plead several
 matters, viz.
 non-assumpfit,
 and non-as-
 sumpsit with-
 in six years.

AT common law the defendant could only plead a *single* plea*, which rigour often abridged the justice of his defence; but to remedy this defect †, the legislature having provided that the defendant, with leave of the court, may plead *as many several matters* as he shall think necessary for his defence‡, it is now a motion of course for this rule for that purpose, without any affidavit in support of the application; as it is not usual for the court, upon the motion, to go into the consideration of the materiality of the pleas§.

And the rule may regularly be obtained in

* 3 Black. Com. 308, 7th ed.

† 2 Wynne's *Eunomus*, 141, 2d ed.

‡ 4 and 5 Anne, c. 16. s. 4.

§ Crozier v. Storke, Sayer, 28.

RULES IN PERSONAL ACTIONS

all actions, except *qui tam* ones*, or where the matters intended to be pleaded are *inconsistent* with each other †, as not guilty, and justification ‡ or non-assumpsit to the whole, and a tender to part ||, or non-est factum, and a tender to part, in an action on a bond §; and if the rule be obtained in any of these cases, it will be *discharged* on motion, after a rule to shew cause; but the court will, at the same time, give the defendant leave to plead either of the pleas ¶; and before the plea is filed the rule should be drawn up, and a copy of it annexed to the plea.

* Morgan v. Luckup, 2 Stra. 1044; Law, qui tam, v. Crowther, 2 Wil. 21; and Heyrick v. Foster, 4 Term Rep. 701.

† Crozier v. Storke, Sayer, 28.

‡ Palmer v. Wadbrooke, 2 Stra. 876.

|| Maclellan v. Howard, 4 Term Rep. 194.

§ Jenkins v. Edwards, 5 Term Rep. 97.

¶ Ibid.

P. } IT is ordered, that the *defendant*, upon
 D. } notice of this rule to be given to *his* attorney, shall abide by *his* plea already pleaded, or plead such other plea peremptorily on the morrow, as shall not be waived; otherwise let judgement be entered for the *plaintiff*—upon the motion of Mr. *Giles*.

For the defendant to abide by his plea.

IT frequently happens that a defendant, especially in actions where he has no defence, in order to gain time, and by which he sometimes gets over the term, will plead a *sham* plea, as a judgement recovered, which is the common one, though now there are a few other's made use of for this purpose, and let the plaintiff proceed thereon, by replying thereto, and making up and delivering the paper-book; but when the time for returning it is expired, he will *waive* his plea, by striking out the special pleadings, and returning the book with the general issue, or a demurrer to the replication.

To prevent which trick, the court will compel the defendant to plead such plea as he will stand

RULES IN PERSONAL ACTIONS

stand by * ; and it is now the practice to obtain this rule for that purpose as soon as the plea is filed, the motion for which is of course without any affidavit in support of it ; though, if the defendant does not, in consequence of the rule, alter his plea already pleaded, the plea *stands* ; and therefore the plaintiff should not sign judgement, but proceed to make up the paper-book † ; and after this rule is obtained, the defendant can only plead the general issue ‡, and give a notice of set off §.

* Foster v. Snow, 2 Burr. 781.

† Webb v. Holt, 2 Stra. 1234.

‡ Hare v. Lloyd, 1 Term Rep. 693.

§ Cockran v. Robertson, in notes, *ibid.*

UPON

P. who, &c. } UPON hearing Mr. *Lambe*,
D. } of counsel for the *plaintiff*,
 and Mr. *Const*, of counsel for the *defendant*,
 and by their consent; It is ordered, upon pay-
 ment of *forty shillings, being one penalty*, and the
 costs of this suit, to be taxed by Mr. *Benton*,
 for the *offence* for which this action is brought,
 that all further proceedings therein be stayed
 —upon the motion of Mr. *Lambe*, for the
plaintiff; and Mr. *Const*, for the *defendant*.

To compound, in
a qui tam action.

P. who, &c. } UPON hearing counsel for
D. } both parties, and by their con-
 sent, and the sum of *five pounds* being paid
 into the hands of *James Templer, esq*; master of
 the Crown Office, for the use of his Majesty;
 It is ordered, that the *plaintiff* have leave to
 compound this action with the *defendant* for
 the sum of *ten pounds*, with costs of suit, to be
 taxed by Mr. *Benton*, in full satisfaction and
 discharge of the *offences* for which this action
 is brought—upon the motion of Mr. *Wigley*,
 for the *plaintiff*; and Mr. *Garrow*, for the *de-*
fendant.

The like.

UPON

RULES IN PERSONAL ACTIONS

The like?

P. who, &c. } UPON hearing counsel for
D. } both parties, and by their consent, and the sum of *ten pounds* being paid into the hands of *James Templer, esq;* the master of the Crown Office, for the use of his Majesty, being a moiety of the composition agreed to be accepted in full satisfaction and discharge of this suit; It is ordered, that the *plaintiff*, who sues as well for our sovereign lord the King as for himself, have leave to compound this action with the *defendant* for the sum of *twenty pounds*, together with his costs of suit, to be taxed by *Mr. Benton*, for the offence for which this action is brought; namely, for *delivering a false account, and omitting to deliver a ticket with horses let to hire*, contrary to the statute in that case made and provided—upon the motion of *Mr. Shepherd*, for the *plaintiff*; and *Mr. Baldwin*, for the *defendant*.

Appointment
and allocatur.

I appoint 1st Feb.
 six o'clock.

For costs, 8*l.* 1*s.* 1*d.*
E. Benton.

E. Benton.

THE legislature having declared that no plaintiff, in a popular action, shall compound before answer, nor after without the order of the

the court *, the parties in such an action cannot settle it until after plea, nor then without leave of the court; but such leave may now generally be obtained in any subsequent stage of the proceedings, even after a verdict against the defendant †, *without* any affidavit of the facts, on the application of one party, and *consent* of the other: and leave was so granted in the cause in which the first of the above rules was drawn up ‡, which was an action brought by a farmer of the duty against an innkeeper, for penalties under the post-horse act §. And so it was in the 2d || and 3d ¶, which were similar actions, as well as in *several others* of the like nature, about the same time.

It may be observed by the above rules, that the rules for leave to compound are not always drawn up quite alike; for that sometimes the nature of the offence for which the action is brought is inserted in the rule, and at other times not, so sometimes the *king's moiety* is

* 18th Eliz. c. 5. f. 3.

† Maughan, *qui tam*, v. Walker, 5 Term Rep. 98.

‡ Cates, who, &c. v. Carrington, Hil. T. 29th Geo. III.

§ 25th Geo. III. c. 51.

|| Cates, who, &c. v. Marsh, Easter T. 29th Geo. III.

¶ Same v. Kemp, Hil. T. 29th Geo. III.

paid

paid before the rule is drawn up, and at other times not; but, if it is not paid before the rule is drawn up, it must be *when* it is * : however, as soon as the rule is drawn up, the above common appointment must be got on it to tax the costs †, which should be served and attended, when the master will *tax* the same, and give his *allocatur* in the above manner thereon; and then, if the money be not paid by the defendant, agreeable to the rule for staying the proceedings, the court will, after a rule to shew cause, grant an *attachment* against him for the non-payment of it §.

And it seems that the court have given leave to compound, on payment of the costs *only* ||, but that they will not very readily do it ‡: therefore, in such cases, as well as in some of the others to be found in the books of practice ¶, it may be prudent to ground the application to the court for the leave to compound, on an *affidavit* of the nature of the action, the reason of the composition, and the other material circumstances of the case.

* Brown, *qui tam*, v. Bailey, 4 Burr. 1929.

† See p. 26.

§ King, *qui tam*, v. Clifton, 5 Term Rep. 257.

|| Loft, 395.

‡ Ibid. 372 and 400.

¶ Tidd, 303; and Impey, 511. 3d ed.

P. } *MONDAY* next after three weeks For a concilium.
D. } of the Holy Trinity, is appointed to
hear counsel for both parties—upon the motion of Mr. Wood.

P. } IT is ordered, that judgement be enter- For judgement.
D. } ed for the *plaintiff*—upon the motion of
Mr. Wood.

WHEN the parties have joined in demurrer, or in error, or a special verdict has been found, or a special case made on the trial, in order to bring the matter before the court for their decision thereon, the above rule for a *concilium* must be obtained; the motion for which is of course, without any affidavit in support of it; and it may not be useless here to observe, that it has been held that counsel's *signing* the motion-paper for this rule, in the fourth term after the last step, was taking a *step* in the cause, and made a term's notice of proceeding after that term unnecessary*.

And in order to set the cause down thereon, the roll on which the pleadings are entered (except where it is a special case, for there is

* Bland v. Darley, 3 Term Rep. 530.

RULES IN PERSONAL ACTIONS

no entry of that made) should be entered with the clerk of the judgements, and then taken, with the motion-paper, after it is signed by the counsel, to the clerk of the papers, when his assistant will mark on the margin of the roll the word "Read," and sign his initials on the motion-paper, thus, "W. B. R." which must then be taken to the clerk of the rules, whose clerk will immediately draw up the above rule thereon. The rule should then be taken to the clerk of the papers, and his assistant will enter it in the cause-book for the next paper day, of which there are two in a week, viz. Tuesdays and Fridays, and it is usual then, though not necessary*, to serve a copy of the rule at the adverse party's attorney's.

And when the judgement of the court is given, the following rule for *judgement* thereon is drawn up; which being only an authority to the clerk of the judgements to enter up the judgement on, does not seem to require service, but, in practice, it is generally served.

* Forbes v. Lord Middleton, 2 Stra. 1242.

P. } IT is ordered, that the *sheriff* of the
 D. } *county of Cornwall* shall, at the ex-
 pence of the *plaintiff*, (1) attend Mr. *Benton*,
 with the *freeholders book of the said county* (2); and
 Mr. *Benton*, in the presence of the attornies of
 both parties, shall name thereout forty-eight
 good and sufficient men, being *freeholders of*
the said county (3), of whom twelve shall be struck
 out on each side, and the remaining twenty-
 four shall be returned by the said *sheriff*, to try
 the issue between the parties—upon the motion
 of Mr. *Yorke*.

For a special
 jury.

(1) The party
 applying.

(2) In London,
 "books or lists
 containing the
 names of the
 persons qualified
 to serve on juries
 in London."

(3) In London,
 "so qualified."

I appoint 2d March,

11 o'clock,

E. Benton.

I appoint 9th March,

11 o'clock,

E. Benton.

Appointments
 thereon, to name
 and reduce the
 jury.

N. B. To name the jury.

N. B. To reduce the jury.

SPECIAL juries were originally in-
 troduced in trials *at bar**; and it being a mat-
 ter of doubt whether the court could direct a
 cause to be tried by a special jury, in trials *not*
at bar, without the consent of the parties, the
 legislature have declared, that on the motion of
 either of the parties, in any cause depending in
 the courts at Westminster, *special juries* shall
 be appointed and struck, to try the cause †. It

* 3 Black. Com. 357, 7th ed. † 3 G. II. c. 25. s. 15.

RULES IN PERSONAL ACTIONS

is therefore quite a motion of course for this rule, without any affidavit in support of it; and if the rule is wanted in *vacation* time, an order to the following effect may (in this, as well as in most if not every other case, where it is a motion of *course* for a rule in the *first* instance) be had at either of the judges chambers, without any summons, for the clerk of the rules to be at liberty to draw up the rule.

“ P. } I order that the clerk of the rules be at
 “ D. } liberty to draw up a rule for a *special*
 “ jury on the part of the *plaintiff*, on producing
 “ counsel’s hand for that purpose. Dated the
 “ 23d day of *February*, 1795. *Kenyon.*”

And when the rule is drawn up, the attorney for the party applying for it should get the first appointment at the foot of the rule from the master’s clerk to *name* the jury, which should be served at the sheriff’s office, and also at the adverse party’s attorney’s; and the appointment must then be attended by the attorney for the party applying for the special jury, when the master (whether the attorney for the adverse party attends or not, the first appointment being now to be attended*) will extract out of the sheriff’s book the *names* and *additions* of *forty-eight* jurors, though the attornies concerned fre-

* See p. 27, ante.

quently

quently save the master that trouble, by consenting to take a jury already named in another cause; and the attorney for the party applying then pays the master and sheriff's fees thereon, which is two guineas to the master, and two guineas to the sheriff; and an office copy of the list of the jury named is made by the master's clerk for each party, who thereupon pays him 5s. each for the same.

When this is done, the attorney for the party applying should in like manner get the second appointment at the foot of the rule, from the master's clerk, to *reduce* the jury, which should, of course, be served at the other party's attorney's, and then attended; when, if both parties attend, the jury is reduced to twenty-four, by each party alternately striking out *twelve*, the attorney for the plaintiff beginning first; but if either party does not attend, the master then strikes out the twelve for the absent party*, and the names and additions of the remaining *twenty-four* are inserted in the *distringas*. And if afterwards the cause goes off at *nisi prius* for default of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed †.

* And see *Rex v. Hart*, esq. Cowp. 412.

† *The King v. Perry* and two others, 5 T. R. 453.

For a view.

P. } IT is ordered, That there issue a
 D. } writ of *distringas juratores*, to be directed to the *sheriff of the county of Devon*, in which shall be contained a clause, commanding the said *sheriff* to have six or more of the first twelve of the jurors to be impannelled and returned to try the issue between the parties at the place in question, before the time of the trial of the said issue, to wit, *upon Saturday, the twenty-fifth day of July* next ensuing; and that *A. B.* on the part of the *plaintiff*, and *C. E.* on the part of the *defendant*, shall attend the same, and shew the matters in question to the said six or more of the first twelve of the said jurors: and that the expence of taking the said view shall be equally borne by both parties, and no evidence shall be given on either side, at the time of taking thereof, the *plaintiff* (1) consenting, that in case no view shall be had, or if any view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be first named in the said writ or not, yet the said trial shall proceed, and no objection shall be made on account thereof, or for want of a proper return to the said writ—upon the motion of Mr. *Praed*.

(1) The party applying for the rule.

THE

THE legislature having directed the courts at Westminster to grant *views*, in actions there depending, where they should appear proper and necessary *, this court some few years ago, in a famous cause then depending †, settled the substance of the rule for the view thereon; since which the above is now become the common rule, and is granted of course, without any affidavit, upon the application of either of the parties, on the terms specified in the rule: and it is one of those rules which an *order* to the following effect may be had in *vacation* time, for the clerk of the rules to be then at liberty to draw up ‡.

“ P. } I order that the clerk of the rules be at
 “ D. } liberty to draw up a rule for a *view*, at
 “ the *plaintiff's* instance, on producing coun-
 “ sel's hand for that purpose. Dated the 20th
 “ day of *July* 1795. *Kenyon.*”

But before the rule for the view can be drawn up, the *name* of the person the other party nominates as his *shewer* must be got from

* 4 and 5 Anne, c. 16. s. 8; and see 3 Geo. II. c. 25. s. 14.

† *Pearse, esq. v. the Earl of Faulconberg and others*,
 1 Burr. 252.

‡ See p. 66 ante.

RULES IN PERSONAL ACTIONS.

his attorney (for either party may name his attorney or agent, or any other person he pleases, as his shewer) as the names of both the shewers should be inserted in the instructions for the rule, with the *time* the *view* is to be *made*, which may be any day the parties can agree on.

And when the rule is drawn up, a copy of it should be served at the other party's attorney's, and the original left at the sheriff's office, with the names of the jury, if it is a special one, who will thereupon summon about nine of the jury to meet at a certain hour, at some *tavern* or *inn* near the place in question, which the under-sheriff and parties previously fix on; where the under-sheriff, or some person from the sheriff's office, and the summoning officer, attend, as well as the attornies and shewers; and when the jury come, they all proceed to the place in question, and *the shewers shew the jury the matters in dispute*, and afterwards it is usual to adjourn to the place of meeting, where the jury take some refreshment and depart, and the attornies then pay the expence of the meeting between them, as well as the sheriff, officer, and jury's fees; which is two guineas to the sheriff, two guineas to the officer, and one guinea each to the jury, if it be a special one; but if a common one, then half a guinea each.

U P O N

IN THE KING'S BENCH.

21

P. } UPON reading the affidavit of *A. B.*
D. } *gentleman*, (1) It is ordered, that the
attornies for both parties shall attend the mas-
ter, who shall examine the matter, and tax
the *defendant* his costs, for that the *plaintiff* hath
not proceeded to trial, pursuant to *his* notice:
which costs, when taxed, shall be paid by the
said *plaintiff*, if it shall appear to the master
that costs ought to be paid—upon the motion
of Mr. *Adam*.

For costs for
not proceeding
to trial pursuant
to notice.
(1) The defend-
ant's attorney's
affidavit of the
facts.

I appoint 6th May,
six o'clock,
E. Benton.

Appointment.

P. } UPON reading the rule made in this
D. } cause, on *Saturday*, [Ec.] (1) and the
affidavit of *C. G. gentleman*, (2) It is ordered, that
the *defendant*, upon notice of this rule, to be
given to *his* attorney, shall, upon *the second day*
of the next term, shew cause why the said rule
should not be discharged—upon the motion of
Mr. *Erskine*.

Nisi to discharge
it.
(1) The above
rule.
(2) The plain-
tiff's attorney's
affidavit of the
facts.

P. } UPON reading the rule made in this
D. } cause, on *Monday*, [Ec.] (1) the affi-
davit of *H. J. gentleman*, (2) and upon hear-

Absolute there-
on.
(1) The rule
nisi.
(2) The defend-
ant's attorney's
affidavit of the
facts.

RULES IN PERSONAL ACTIONS

(3) The rule
for the costs,

ing counsel for both parties; It is ordered, that the rule made in this cause on *Saturday*, [E.c.] (3) be discharged—upon the motion of Mr. *Erskine* for the *plaintiff*, and Mr. *Palmer* for the *defendant*.

IF the plaintiff gives notice of trial, but does not proceed to trial accordingly, nor countermand the notice in time, it is a motion of course, for the above rule, for the *extra costs* occasioned by such neglect, on a short affidavit of the facts; and upon which the appointment must be got from the master's clerk, and served, and attended with a bill of the costs applied for, when the master will tax the same on the first appointment*, if no *reasonable* cause can be shewn on the part of the plaintiff for his not proceeding to trial.

But as every act of the master is liable to be *reviewed*, on appeal to the court, (though in judging of ordinary stages of practice he is invested with original and competent jurisdiction)† if either of the parties should be dissatisfied with the master's decision, he may

* See p. 27, ante.

† 2 Wynne's *Eunomus*, 156.

appeal

appeal therefrom, by an application to the court, supported by an affidavit of the facts, either for the master to *review* his taxation, or to *discharge* the rule for the costs, as the case may happen to be.

As where the plaintiff, in an action which stood for trial in the cause-paper, at the Lent assizes at Maidstone, 1789, *withdrew the record*, in consequence of the late Mr. Justice Gould having *non-suited* the plaintiff in a similar action, which stood in the paper, and came on to be tried before it, on a point which would also have arisen in the action in which the record was withdrawn; and the nonsuit having afterwards been set aside by the court, on account of the *misdirection* of the judge*; and the defendant having obtained the above rule for costs, for not going on to trial, the plaintiff applied, on an affidavit of the circumstances, to discharge it, when the court held the *reason* for withdrawing the record *sufficient*, and therefore granted the above rule nisi to discharge the rule for the costs; and after hearing the other side made it absolute, and the last of the above rules was drawn up thereon†.

* See the case Cates, who, &c. v. Winder, 81 post.

† Same v. Mellish, T. T. 29 Geo. III.

UPON

Nisi for judgement, as in the case of a nonsuit.

(1) Of the facts.

P. } UPON reading the affidavit of *A. B.*
 D. } (1) and the entry of the issue on record; It is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, shall, upon *Monday*, [*&c.*] shew cause why the like judgement should not be given for the *defendant* as in the case of a nonsuit, pursuant to the statute in that case made and provided—upon the motion of Mr. *Russell*.

Discharging the rule nisi, on a peremptory undertaking.

(1) The rule nisi.

(2) The plaintiff's attorney's affidavit of the facts.

(3) If in the country, "next assizes to be held for the county of *Kent*," &c.

P. } UPON reading the rule made in this
 D. } cause, on *Monday*, [*&c.*] (1) in *this term*, the affidavit of *E. F. gentleman*, (2) upon hearing counsel for both parties, and upon the undertaking of the *plaintiff* to bring on the issue in this cause to be tried at the *sitting after this term for London* (3); It is ordered, that the said rule be discharged, and further time is allowed to the *plaintiff* to bring on the issue to be tried pursuant to *his* undertaking; and the same is then peremptorily to be brought on to be tried—upon the motion of Mr. *Erskine* for the *plaintiff*, and Mr. *Bower* for the *defendant*.

UPON

P. } UPON reading the rule made in this
 D. } cause, on *Monday*, [Etc.] (1) the affidavit of *G. H. gentleman*, (2) and upon hearing counsel for both parties; It is ordered, that the like judgement be entered for the *defendant* as in the case of a nonsuit, pursuant to the statute in that case made and provided—upon the motion of *Mr. Palmer* for the *plaintiff*, and *Mr. Lawes* for the *defendant*.

Absolute for judgement, as in the case of a nonsuit, on hearing both parties.

(1) The rule nisi.

(2) The plaintiff's attorney's affidavit of the facts.

P. } UPON reading the rule made in this
 D. } cause, on *Monday*, [Etc.] (1) the affidavit of *A. B.* (2) and no cause being shewn to the contrary; It is ordered, that the like judgement be entered for the *defendant* as in the case of a nonsuit, pursuant to the statute in that case made and provided—upon the motion of *Mr. Russell*.

The like.
 No cause shewn.

(1) The rule nisi.

(2) Of the service of the rule nisi.

THE legislature having authorized the court to give judgement for the defendant, as in the case of a *nonsuit*, in default of the plaintiff's proceeding to trial in due time *, if he

* 14 Geo. II. c. 17. s. 2.

RULES IN PERSONAL ACTIONS

does not give notice of trial in the term succeeding that in which the issue was joined *, or proceed to trial pursuant to his notice, the defendant may apply to the court for judgment, as in the case of a nonsuit, without any notice of the motion † (even though no proceedings have been had for *four* terms; for it is held that the rule requiring a term's notice of proceeding in that case does not extend to this motion ‡) on a short affidavit of the facts, and on which the above rule nisi will be granted, that is supposing the issue is entered; for that must first be done, as the rule is drawn up upon reading the entry of the issue on record, as well as the affidavit, so that the entry of the issue is supposed to be read at the time of the motion; but that is now dispensed with, and the practice is to get the clerk of the papers to mark the roll "Read," either in the treasury, before the court sits, or in court at the time the motion is made.

But a *peremptory* undertaking is in general now sufficient to discharge the rule nisi on the *first* application, except in penal actions; for this rule is granted in *qui tam* actions, as well

* Hall v. Buchannan, 2 Term Rep. 734.

† And see Loft, 265.

‡ Doe, on the demise of Phillips and others, v. Moses, 5 Term Rep. 634.

as others *, and in such the court will expect a *real* excuse; but the *insolvency* of the defendant, since the commencement of the action has been held a sufficient one with a *peremptory* undertaking †: and a rule to the effect of the second of the above rules is drawn up thereon; and though the rule nisi be discharged on an affidavit which contains an answer false in itself, yet the court will not afterwards open the matter, on an affidavit disproving the contents of the former one, as the costs is the only object of such an application ‡.

And if the plaintiff *afterwards* does not proceed to trial, pursuant to his undertaking, the court will, on a short affidavit of the facts, accompanied by an office copy of the peremptory rule, which should previously be got from the clerk of the rules' office, grant another rule nisi, on the shewing cause against which the court will expect a *reasonable* excuse; and the *insolvency* of the defendant, after the action brought, has been held a sufficient one §: but if the cause shewn be *insufficient*, the rule nisi will be made absolute, and the rule thereon will be drawn up to the effect of the third of the above rules; and

* Watson, qui tam, v. Jackson, 1 Wil. 325. 4th ed. But see Sayer, 22. S. C.

† Cates, who, &c. v. Palmer, E. T. 29 Geo. III.

‡ Davies v. Cottle, 3 Term Rep. 405.

§ Bailly v. Wilkinson, Doug. 646.

RULES IN PERSONAL ACTIONS

so will either of the rules nisi be made absolute, if no cause be shewn against them, on an affidavit of the service of the rule, and then the absolute rule thereon is drawn up to the effect of the last of the above rules.

But in *replevin*, the rule will not be granted, as both parties are actors, and the defendant may carry down the record by proviso *; nor where the plaintiff has *once* carried down the record for trial, as after that the defendant should carry it down by proviso †: neither will the rule be granted until *after* the term succeeding that in which the issue is joined, if the plaintiff do not give notice of trial, even though it may have been joined early enough in the term for the plaintiff in a town cause to have given notice of trial for the sittings after the term ‡; nor unless *all* the defendants apply for it ||: neither can *one* of two defendants have judgement, as in the case of a nonsuit, *at all*, if the other defendant has let judgement go by *default* §.

* Jones v. Concannon, 3 Term Rep. 661; and Shortridge v. Hiern, 5 Term Rep. 400.

† King v. Pippett, 1 Term Rep. 492; and Mewburn v. Langley, 3 Term Rep. 1.

‡ Munt and another v. Tremamondo, 4 Term Rep. 557.

|| Watson, qui tam, v. Jackson, Boys, and Webster, Sayer 22; and Jennings, qui tam, v. Wilson and two others, ib. 103.

§ Weller v. Goyton and Walker, 1 Burr. 358.

P. } IT is ordered, that the *plaintiff*, upon
 D. } notice of this rule, to be given to *his*
 attorney, shall, upon *Saturday*, [*&c.*] shew
 cause why the *nonfuit* (1) obtained in this cause,
 should not be set aside, and a new trial had
 between the parties; and that in the mean time
 further proceedings in this cause be stayed—
 upon the motion of Mr. *Erskine*.

Nisi to set aside
 a nonsuit, and
 for a new trial
 thereon.

(1) Or "ver-
 dict."

P. } UPON reading the rule made in this
 D. } cause, on *Wednesday*, [*&c.*] (1) and
 upon hearing counsel for both parties, It is or-
 dered, that the *nonfuit* (2) obtained in this cause
 be set aside, and a new trial had between the
 parties—upon the motion of Mr. *Erskine* for
 the *plaintiff*, and Mr. *Rous* for the defendant.

Absolute there-
 on.

(1) The rule
 nisi.

(2) "Or ver-
 dict."

P. } UPON reading the rule made in this
 D. } cause, on *Monday*, [*&c.*] (1) and upon
 hearing counsel for both parties, It is order-
 ed, that the said rule be discharged; and it is
 referred to the master to tax the *plaintiff* his
 costs occasioned by this application; which
 costs, when taxed, shall be paid by the *defendant*

Discharging the
 rule nisi, with
 costs.

(1) The rule
 nisi.

to

RULES IN PERSONAL ACTIONS

to the *plaintiff* or his attorney—upon the motion of Mr. *Mingay* for the *plaintiff*, and Mr. *Erskine* for the *defendant*.

IF a *verdict* has been obtained, or the plaintiff has been *non-suited* by the mistake or *misdirection* of the judge at nisi prius, even in a penal action*, the court will, after a rule to shew cause, *without* any affidavit of the facts, (unless the judge who tried the cause happen to die in the intermediate time; for then it seems the course is for the account of the cause to be brought before the court upon affidavit †) set it aside *without* costs ‡.

As where, in a *penal* action, a notice to produce papers on the trial had been served on the *defendant's* attorney, and the late Mr. Justice Gould, who tried the cause at the Maidstone assizes, 1789, had non-suited the plaintiff, because the notice was not served on the *defendant himself*; the court, on a motion to set the nonsuit aside, being of opinion the *service* was *sufficient*, granted the above rule nisi for that purpose, and

* *Wilson v. Rastall*, 4 Term Rep. 753.

† *The King v. Daniel Holt*, 5 Term Rep. 436.

‡ *Pochin v. Pawley*, 1 Sir W. Black. 670; *Rice v. Shute*, 2 Sir W. Black. 695; and 5 Burr. 2611. S. C.

afterwards

IN THE KING'S BENCH.

Afterwards made the same absolute, and the second of the above rules was drawn up thereon*.

The rules for a *new trial* will also be granted in a variety of other cases, where the grounds are sufficient in the opinion of the court, most of which are to be found in the books of practice †. And in such cases, if the point has been saved at *nisi prius*, or the facts on which the application is founded will appear on the judge's report who tried the cause, the rule *nisi* may be obtained *without* any affidavit in support of it; but if the point has not been saved, or the facts will not appear from the report, there must be an *affidavit* of the circumstances. And if, on shewing cause against the rule *nisi*, the opinion of the court is with the verdict or nonsuit, they will frequently *discharge* the rule *with* costs, and then the rule thereon is drawn up to the effect of the last of the above rules.

It has been said, that when a new trial is granted, it is always *upon* payment of costs

* Cates, who, &c. v. Winder, reported in 3 Term Rep. 306, by the name of Cates, qui tam, v. Winter.

† Sellon, 505; Tidd, 601; Impey, 262, 3d ed.

RULES IN PERSONAL ACTIONS

to the party in possession of the verdict* ; but the rule does not seem to be quite so general, for verdicts and nonsuits obtained by the mistake or misdirection of the judge at *nisi prius* are now constantly set aside, and new trials directed thereon, *without* costs † ; and so verdicts have been set aside, and new trials granted without costs, where they have been obtained by a trick ‡, or an unfair advantage §, or contrary to law and the judge's opinion ||.

So it has been said to be the practice of this court, that the rule *nisi* must be moved for *within* four days of the beginning of the term, including the first, if the cause was tried in the preceding vacation ; but that the court will, under particular circumstances, permit the new trial to be moved for after the four days are

* Bright, executor of Hannah Crisp, widow, v. Eynon, 1 Burr. 390.

† See p. 80, ante.

‡ Montpeffon v. Randle, Bull. *Nisi Prius*, 328.

§ Anderson v. George, 1 Burr. 352.

|| Pochin v. Pawley, 1 Sir W. Black. 670 ; Edie and another v. the East India Company, *ibid.* 295, and 2 Burr. 1216, S. C.

expired :

expired*: and in a late case † it was held, that the defendant could not be heard upon a motion for a new trial after the *first four days* of the term, and that the rule was the same in civil as in criminal cases.

But as the rule for judgement cannot regularly be entered till the return day of the distringas, which, if the cause be tried in vacation, is commonly the first day of the term, and which does not expire till *four* days after, *exclusive* of the day it is entered, *i. e.* if entered on the third it will not expire till the seventh; and if a *Sunday* ‡, or any other day on which the court does *not* sit, intervene, then not till the eighth, until after which day the final judgement on the postea cannot be signed: and as it is said the party is allowed this time either to move for a new trial, or in arrest of judgement §, it seems as if he has *four days exclusive of the first*, or five including it, besides the further time for the days on which the court may not sit.

* Birt v. Barlow, Doug. 162.

† The King v. Daniel Holt, 5 Term Rep. 436.

‡ 4 Burr. 2130.

§ Boote's Suit at Law, 179, 2d ed. Richardson's Pr. 274, 5th ed.; and Impey's Pr. 256, 3d ed.

RULES IN PERSONAL ACTIONS

But it does not seem that the plaintiff has this time to move for a new trial on a *non suit*, inasmuch as there is no rule for judgement given in that case, and the judgement thereon may be signed immediately after the return of the *distringas**.

* Richardson's Pr. 275, 5th ed.

P. } IT is ordered that the *plaintiff*, upon
 D. } notice of this rule to be given to *his*
 attorney, shall, upon *Saturday* [*&c.*] shew cause
 why the judgement *on the sixth, ninth, and*
twelfth counts, (1) should not be arrested, and
 that in the mean time further proceedings in
 this cause be stayed—upon the motion of Mr.
Palmer.

Nisi to arrest the
 judgement.

(1) Being the
 counts on which
 the verdict was
 taken; but if
 the verdict be
 taken *generally*,
 then this part
 is not inserted.

P. } UPON reading the rule made in this
 D. } cause on *Saturday* [*&c.*] (1) and upon
 hearing counsel for both parties; It is ordered,
 that the judgement *on the sixth, ninth, and*
twelfth counts be arrested—upon the motion of
 Mr. *Erskine* for the *plaintiff*, and Mr. *Palmer*
 for the *defendant*.

Absolute there-
 on.
 (1) The rule
 nisi.

BEFORE the judgement is entered up,
 it may be *arrested* for various causes to be
 found in the books*; and the mode of doing
 it is to move the court in arrest of the judge-

* 3 Black. Com. 393, 7th ed; Sellon's Pr. 523; and
 Tidd's Pr. 612.

RULES IN PERSONAL ACTIONS.

ment ; who thereupon grant a rule nisi, the motion for which requires no affidavit in support of it, inasmuch as the ground of the application must appear *on the record**; for the court will not arrest the judgement upon matters not appearing on the face of it, because they are to judge upon the record itself†.

As where, in an action for penalties under the post-horse act‡, the jury at the trial found a verdict for the plaintiff, on the 6th, 9th, and 12th counts of the declaration, for three penalties of ten pounds each; the court, on a motion in arrest of judgement, being of opinion the act had *ousted* the jurisdiction of the superior courts as to those penalties, granted the above rule nisi to arrest the judgement, and afterwards made it absolute, and the above rule was drawn up thereon§; and similar rules were also made at the same time in another action of the like nature||.

* *Pechey v. Harrison*, 1 Lord Raym. 232; and 3 Black. Com. 393, 7th ed.

† *Sutton v. Bishop*, 4 Burr. 2283.

‡ 25th Geo. III. c. 51. s. 15 and 28.

§ *Cates, qui tam, v. Knight*, 3 Term Rep. 442.

|| *Same v. Mellish*, ib.

The motion in arrest of judgement may be made at any time *before* the judgement is entered, even after a rule nisi for a new trial has been discharged*; but it cannot be made *after* there has been judgement in *demurrer*, for an exception that *might* have been taken on arguing the demurrer†; and if the defendant means to apply for a new trial, and move in arrest of the judgement too, the motion for a new trial must *precede* the one in arrest of judgement; as a motion for a new trial cannot be made after a motion in arrest of judgement: and the court, if they grant a rule nisi for a new trial, will, at the instance of the party applying, make it part of the rule that the defendant shall have a certain *specific* time, *e. g.* three days, to move in arrest of judgement, after they shall have given their opinion upon the motion for a new trial‡; or will grant the rule nisi in the *alternative*, *i. e.* to shew cause why a new trial should not be granted, or the judgement arrested||; and if the court arrest the judgement, each party must then pay their own costs§.

* Taylor v. Whitehead, Doug. 716.

† Edwards v. Blunt, 1 Stra. 425.

‡ Rex v. White and Ward, 1 Burr. 333.

|| Cameron et al. v. Reynolds, under-sheriff, Cowp. 403.

§ Ibid,

RULES IN PERSONAL ACTIONS

Nisi to retain
the damages
and costs in one
action towards
satisfaction of
the debt and
costs in another,
between the
same parties.
(1) Of the facts.

A. B. in trespass. } UPON reading the affi-
B. A. in debt. } davit of *E. F. gentle-*
man, and another, (1) It is ordered, that the
plaintiff in the first cause, upon notice of this
rule to be given to *his* attorney, shall upon
Saturday next shew cause why *B. B. the defend-*
ant in the said first cause, and *plaintiff* in the
second, should not be at liberty to retain in *his*
hands the *damages* recovered at *the last assizes*
held at the castle of Exeter, in and for the county
of Devon, by the said *A. A. the plaintiff* in the
said first-mentioned cause, together with *his*
costs therein, towards satisfaction of the *debt*
recovered against the said *A. A.* at the same
assizes, by the said *B. B.* in the said last-men-
tioned cause, and *his* costs, to be taxed
therein; and that all further proceedings there-
in be stayed—upon the motion of Mr. Gibbs.

Absolute there-
(1) The rule
nisi.
(2) Of the ser-
vice of the rule
nisi.

A. B. in trespass. } UPON reading the rule
B. A. in debt. } made in this cause, on
Wednesday [Etc.] (1) the affidavit of *G. H.* (2)
and no cause being shewn to the contrary; It is
ordered, that *B. B.* the *defendant* in the said first
cause,

IN THE KING'S BENCH.

cause, and *plaintiff* in the second, be at liberty to retain in *his* hands the *damages* recovered at *the last assizes held at the castle of Exeter, in and for the county of Devon*, by *A. A.* the *plaintiff* in the said first-mentioned cause, together with *his* costs therein, towards satisfaction of the *debt* recovered against the said *A. A.* at the same *assizes*, by the said *B. B.* in the last-mentioned cause, and *his* costs to be taxed therein—upon the motion of Mr. Gibbs.

IT is the course of the court now to permit money recovered by judgement in cross actions to be *set off**, even though a third person is concerned †; and they will therefore, in such cases, on a motion, supported by a short affidavit of the facts, grant a rule nisi of the above nature, and afterwards make it absolute, whether it is opposed or not; which was the reason no cause was shewn against this rule nisi, and thereupon it was made absolute,

* Baskerville v. Brown, and Brown v. Baskerville, 2 Burr. 1229; and Wills and Crabb, Bull. Ni. Pri. 336.

† Mitchell v. Oldfield, 4 Term Rep. 123.

and

RULES IN PERSONAL ACTIONS

and the last of the above rules was drawn up thereon *. But as the *attorney* for the party against whom the application is made has a *lien* for his costs in the matter on the money recovered by his client †, if he insists on it, when the application is made, the court will not divest him of his lien, but direct him to be *paid*, *before* they permit the set-off to be made ‡; indeed so careful are the court that the attorney shall be paid, that where the defendant's attorney paid the plaintiff himself the debt and costs recovered, *after notice* from the plaintiff's attorney not to do so, because their bill was not satisfied, the court ordered the former to pay over again to the latter the amount of their lien on such debt and costs ||.

* *Frost v. Woolcombe*, and *Woolcombe v. Frost*, E. T. 27th Geo. III.

† *Welch v. Hole*, Doug. 226.

‡ *Mitchell v. Oldfield*, 4 Term Rep. 123.

|| *Read v. Dupper*, 6 Term Rep. 361.

P. } IT is ordered, that an order of nisi prius
 D. } made at *the sitting held at Guildhall,*
 in and for *the city of London,* on *Tuesday the 4th*
day of March last past, before *the Right Honour-*
able Lloyd Lord Kenyon, Lord Chief Justice of this
court, assigned to hold pleas in this court, be en-
 tered and made a rule of this court; which said
 order is in the words following; to wit, It is
 ordered by the court, by and with the consent
 of the *plaintiff and defendant,* their counsel and
 attornies, that *it be, and it is hereby referred to*
A. B. of London, merchant, to take and settle the
accounts between the plaintiff and the defendant;
and that a verdict shall be entered for such sum as
shall be found due by the said arbitrator, from
the defendant to the plaintiff, so as he shall make
 and publish his award in writing, of and con-
 cerning the premises in question, on or before
 the *second day of Michaelmas term now next en-*
suing, and that the said parties shall and do
 perform, fulfil, and keep such award, so to be
 made by the said *arbitrator* as aforesaid. And
 it is also ordered, by and with such consent
 as aforesaid, that the costs of this cause shall
 abide

Making an or-
 der of nisi prius
 a rule of court;

Or, ("The jury
 find a verdict for
 the plaintiff,
 damages 3,300 l.
 costs 40 s. sub-
 ject to this or-
 der, and the a-
 ward to be made
 pursuant thereto;
 and that all mat-
 ters in difference
 between the parties
 in this cause shall
 be referred to
 the award, order,
 arbitrament,
 final end and
 determination of
 A. B. C. D. and
 E. F. all of Lon-
 don, merchants.")

RULES IN PERSONAL ACTIONS

abide the event and determination of the said award, and that the costs of the reference shall be in the discretion of the said *arbitrator*, who shall direct and award by whom, and to whom, and in what manner, the same shall be paid. And it is likewise ordered, by and with such consent as aforesaid, that the *plaintiff* and *defendant* respectively are to be examined upon oath, to be sworn before the Lord Chief Justice, or some other Judge of the same court of our Lord the King, before the King himself, if thought necessary, by the said *arbitrator*, and to produce before the said *arbitrator* all books, papers, and writings, touching or relating to the matters in difference between the said parties, as the said *arbitrator* shall think fit; and that the witnesses of the *plaintiff* and *defendant* respectively are to be examined upon oath, to be sworn before the Lord Chief Justice, or some other Judge of the same court. And it is also ordered, by and with such consent as aforesaid, that neither the *plaintiff* or the *defendant* shall prosecute or bring any action or suit, in any court of law or equity, against the said *arbitrator*, or bring or prefer
any

any bill in equity against each other, of and concerning the premises so as aforesaid referred. And it is further ordered, by and with such consent as aforesaid, that if either *party* shall, by affected delay or otherwise, wilfully prevent the said *arbitrator* from making *his* award, *he* shall pay such costs to the *other* as the court of our Lord the King shall think reasonable and just. And lastly, it is ordered, by the like consent as aforesaid, that the said court of our Lord the King may be prayed, that this order may be made a rule of the same court—upon the motion of Mr. 'Espinasse.

P. } UPON reading the order of nisi prius,
D. } *this day* made a rule of court, and by the consent of counsel for both parties; It is ordered, that the time limited for the *arbitrator's* making *his* award in this cause be enlarged for *fourteen days next ensuing*—upon the motion of Mr. 'Espinasse, for the *plaintiff*, and Mr. *Chambre* for the *defendant*.

Enlarging the time for the arbitrator's making his award.

WHEN

RULES IN PERSONAL ACTIONS

WHEN a cause is *referred* at *nisi prius*, and either party have afterwards occasion to apply to the court thereon, as for instance to *enlarge* the time for the arbitrator's making his award (the motion for which is *of course*, without any affidavit of the facts, on the application of one party, and *consent* of the other) the order of *nisi prius* must at the same time, if not previously done, be made a rule of court; the motion for which is also of course*, without any affidavit of the facts, on the application of *either* party, and the rules thereon will be drawn up to the above effect.

The order of *nisi prius*, made an order of court of by the above rule, is the common one on a reference at *nisi prius* in London and Middlesex; and it may be observed that it seems prudent, on the part of the plaintiff, always to have a verdict taken for a *certain sum*, subject to the reference; as it is said, if there be bail in the action they will otherwise be discharged†; and it also seems the sum should be a *sufficient* one to cover the plaintiff's demand, as it is said if the award be for a less sum than the verdict, the plaintiff

* Rex v. Addington, Sayer, 259.

† Sellon's Pr. 483.

may

may levy the equitable costs out of the excesses*.

And it must always be remembered, that the submission to the reference of *all matters in difference between the parties in the cause* is not confined to the subject matter in the particular action then depending, but will extend to cross demands between the parties, but a reference of *all matters in difference in the cause between the parties* is confined solely to the matters in dispute in that action †; and in order to mark the distinction between the two references the more clearly, it has been recommended that the words of the former reference should be of *all matters in difference between the parties*, omitting the words "in the cause," and the latter *all matters in difference in the cause*, omitting "between the parties ‡."

The clause that the costs in the cause shall abide the event, means only the *legal event*, and therefore the plaintiff is not entitled to costs, if the arbitrator award him a less sum than would

* Impey's Pr. 653, 5th ed.

† Malcolm and another, assignees, &c. v. Fullarton, 2 Term Rep. 645.

‡ Smith v. Muller, 3 Term Rep. 624.

carry

RULES IN PERSONAL ACITONS

carry costs on a verdict*; nor are executors liable to costs on such a reference, other than they would have been on a verdict†; and the costs meant are only the *common costs* between *party and party*; and if the arbitrator award more as costs between *attorney and client*, the court will, after a rule nisi, set that part of the award aside‡. And if either party, after the order of nisi prius is made a rule of court, file a *bill in equity* respecting the matters referred, the court will grant an *attachment* against him, and at least make him dismiss the bill, and pay all the costs occasioned by such misconduct§.

* Swinglehurst v. Altham and another, 3 Term Rep. 138.

† Loft, 391; and Highnam and another, executors, &c. v. Haffell, cited in Swinglehurst v. Altham and another.

‡ Marder v. Cox, Cowp. 127.

§ Rex v. James Wheeler, 3 Burr. 1256.

UPON

P. } IT is ordered, that the attorney for the
 D. } *plaintiff* shall give notice to Mr. H.
 attorney for the *defendant*, of the time of tax-
 ing costs between the parties, that he may be
 present if he thinks fit.

To be present at
 taxing costs.

Side bar.

WHEN the action is decided, and the attorney for the successful party is intitled to sign his judgement, and consequently to tax his *increased* costs thereon, the attorney for the unsuccessful party may get this rule to have notice of the time of *taxing* the costs, and thereby an opportunity of seeing what the master allows, and of objecting to any improper charge that may be made before the master; who, after hearing both parties, will decide whether the charge objected to, or any and what part of it, ought to be allowed, and will thereupon allow or disallow it accordingly.

But if the charge in dispute be of any magnitude, and the party against whom the master gives his opinion is *dissatisfied* therewith, it may be adviseable for him to appeal therefrom *, by

* See p. 72, ante.

RULES IN PERSONAL ACTIONS

an application to the court, on an affidavit of the facts, for the master to *review his taxation*; when the court will grant a rule nisi, if they should not be satisfied with the master's decision, which will afterwards be made absolute, or not, as the ultimate opinion of the court may happen to be.

And if the successful party is intitled to tax his costs the same day the rule to be present is served, the notice of the taxation should be *immediately* given; but if he is not intitled to tax them so early, then the unsuccessful party's attorney should at least have a *day's* notice: this notice it is customary, among the respectable part of the profession at least, *to give*, whether a rule be taken out for the purpose or not, and which is usually to the following effect.

" In the King's Bench.

" *P. against D.*

" *Sir,*

" *I shall tax the costs in this cause*

" *to-morrow evening, at six o'clock.*

" *To Mr. W. H. Lincoln's Inn,*"

" *W. D. Gray's Inn,*"

" *Defendant's attorney.*"

" *Plaintiff's attorney.*"

" *10th June 1795.*"

UPON

P. } UPON reading the affidavit of *A. B.*
 D. } *gentleman* (1), It is ordered, that the
plaintiff, upon notice of this rule to be given
 to *him*, or *his* attorney, shall, upon *Monday*,
 [Ec.] shew cause why the proceedings in the
 action brought against the bail of the *defen-*
dant, upon their recognizance, should not be
 stayed until the determination of the writ of
 error now depending on the judgement in this
 cause, and that in the mean time further
 proceedings be stayed—upon the motion of
Mr. Baldwin.

Nisi to stay the
 proceedings
 against the bail,
 pending a writ
 of error.

(1) The defen-
 dant's attorney's
 affidavit of the
 facts.

P. } UPON reading the rule made in this
 D. } cause, on *Friday*, [Ec.] (1) *the affi-*
davit of C. E. gentleman (2), and *the affidavit*
of F. G. gentleman (3), and upon hearing coun-
 sel for both parties; It is ordered, that further
 proceedings against the bail of the *defendant*
 be stayed, until the writ of error, now de-
 pending on the judgement in this cause, shall
 be determined; and, with the consent of the
 said bail, it is further ordered, that the said

Absolute thereon

(1) Rule nisi.

(2) Of the ser-
 vice of the rule.

(3) The plain-
 tiff's attorney's
 affidavit of the
 facts.

RULES IN PERSONAL ACTIONS

bail shall, within four days next after the determination of the said writ of error, in case the same shall be determined in favour of the *defendant* in error, surrender the *defendant* into the custody of the marshal of the marshalsea of this court—upon the motion of Mr. *Lambe* for the *plaintiff*, and Mr. *Baldwin* for the *defendant*.

WHEN the plaintiff proceeds against the bail on their recognizance, and the defendant brings a writ of error on the judgement, and *before* the bail are fixed, *i. e.* before the time for their surrendering the defendant is expired, applies, as he may do, on a short affidavit of the facts, to stay the proceedings against the bail pending the writ of error, it is a motion of course for the above rule nisi thereon, and which will afterwards be made absolute * on an affidavit of the service, if there be no cause shewn, or, on shewing cause, if it is opposed; and then the absolute rule is drawn up to the above effect.

* Capron v. Archer, 1 Burr. 340.

But

But if the application be not made until *after* the time for surrendering the defendant is expired, the bail are not at liberty to surrender him, but will be ordered to *pay the money* within *four* days after the affirmance of the judgement *, *i. e.* the final affirmance of it †.

The court, however, will *not* stay the proceedings, if it appear plainly and unequivocally to them that the writ of error is brought merely *for delay* ‡, as if the party himself confesses §, or his attorney ||, or bail ¶, declare that the writ of error is brought only for delay, or use expressions equivalent to such a declaration **. But the plaintiff's swearing, that the writ of error is brought for delay, is *not* sufficient to induce the court not to stay

* Richardson v. Jelly, 2 Stra. 1270.

† Kershaw v. Cartwright and Pearce, bail of Green, 5 Burr. 2819.

‡ Entwistle and others v. Shepherd and others, 2 Term Rep. 78; Carter v. Roberts, and Butt v. Mow, *ibid.*; and Kempland v. Macauley and another, 4 Term Rep. 436.

§ Pool v. Charnock, 3 Term Rep. 79.

|| Law v. Smith, 4 Term Rep. 436.

¶ Evans v. Gilbert, *ibid.*

** Masterman v. Grant, 5 Term Rep. 714.

RULES IN PERSONAL ACTIONS

the proceedings *, nor is the writ of error's being brought on a judgement of nonsuit of itself a sufficient ground for that purpose †, though the court in one case *refused* to set aside a defendant's execution for the costs of a nonsuit, sued out after a writ of error was brought, and the allowance of it served ‡.

Neither will the court permit execution to be taken out pending a writ of error in parliament, merely because the defendant suffered the judgement to be affirmed in the exchequer chamber *without* argument §: and if the plaintiff brings an action on the judgement, the court will give the defendant leave to *imparle* until the determination of the writ of error ¶; but if the defendant obtains no such leave, and the plaintiff proceeds on, and recovers, yet he *cannot* sue out *execution* on the second judgement until the writ of error be determined ¶¶.

* Christie v. Richardson, 3 Term Rep. 78.

† Levett v. Perry, 5 Term Rep. 669.

‡ Kempland v. Macauley and another, 4 Term Rep. 436.

§ Harrison v. Grote, 6 Term Rep. 400.

¶ Newton v. Swymmer, Sayer, 43.

¶¶ Benwell v. Black, 3 Term Rep. 643.

P. } IT is ordered, that the marshal of the
 D. } marshalsea of this court shall bring the
defendant into this court, within three days next
 after notice of this rule to be given to him; or
 shall give a note in writing under his hand, ac-
 knowledging the *defendant* to be in his actual
 custody; or shall shew cause to the contrary
 within the time aforesaid, upon notice thereof
 being given to the attorney for the *plaintiff*.

For the marshal
 to acknowledge
 the defendant to
 be in his custo-
 dy.

Side Bar.

I do hereby acknowledge the within-
 named *defendant* to be a prisoner in my custody,
 at the suit of the within named *plaintiff*. Dated
 the 30th April, 1793.

The marshal's
 acknowledge-
 ment thereon.

W. Jones, marshal.

BEFORE a prisoner in the custody of
 the marshal can be charged *in execution*, it is
 necessary to get the marshal's acknowledge-
 ment of the prisoner's being in his custody; in
 order to do which, the above rule must be got
 from the clerk of the rules' office, and left at

H 4

the

RULES IN PERSONAL ACTIONS

the office of the clerk of the papers of the king's bench prison, and which may commonly be had again the following day, with the marshal's *acknowledgement* thereon, to the above effect; wrote either at the foot or on the back of the rule. And this acknowledgement of the marshal's must be *of the same term* the defendant is charged in execution; for if there be none of that term, the court will discharge the defendant for want of it*.

* Fisher v. Stanhope, 1 Term Rep. 464.

UPON

P. P. *plaintiff.* } UPON reading the pe-
 D. D. *defendant.* } tition of the *defendant*,

(1) the copy of the sheriff's warrant, the certificate of the keeper of the sheriff's ward or prison in and for the county of *Devon* (2), the affidavit of *E. F.* (3) the affidavit of *G. H.* and the notice and account thereto annexed (4); It is ordered, that the said keeper shall carry the *defendant* before the judges who shall hold the next assizes in and for the said county; and that a copy hereof be delivered to the *plaintiff*, or left for *him* at *his* usual place of abode, at least *fourteen* days before the said assizes, that *he* may personally, or by *his* attorney, shew cause (if any *he has*) against the discharge of the said *defendant* out of the custody of the *sheriff* of the said county, as to the execution with which *he* stands charged at *his* suit, pursuant to the several acts of parliament made for the relief of debtors, with respect to the imprisonment of their persons.

To bring the defendant up to be discharged under the lords act, in the country.

(1) For the rule.

(2) Of the cause of detainer.

(3) Of the signature of the defendant to the petition, and of the keeper to the certificate.

(4) Of the service of the notice on the plaintiff.

UPON

The like, in
10600.

(1) For the
rule.

(2) The mar-
shal's certificate
of the cause of
detainer.

(3) Of the sig-
nature of the de-
fendant to his
petition.

(4) Of the ser-
vice of the no-
tice on the plain-
tiff.

P. P. plaintiff. } UPON reading the peti-
D. D. defendant. } tion of the *defendant*,

(1) the certificate thereto (2) annexed, the affidavit of *E. F. gentleman* (3), the affidavit of *G. H.* and the notice thereto annexed (4); It is ordered, that the *plaintiff*, upon notice of this rule to be given to *him*, shall, upon *Saturday the 13th day of June instant*, at *Serjeant's-inn hall*, at the hour of *nine* in the morning of the same day, shew cause why the said *defendant* should not be discharged out of the custody of the marshal of the marshalsea of this court, as to the execution at the suit of the said *plaintiff*; And that the said marshal do bring the said *defendant* to the said place at the time aforesaid.

Remanding the
defendant there-
on.

(1) The above
rule.

(2) In opposi-
tion to the de-
fendant's dis-
charge.

P. P. plaintiff. } UPON reading the rule
D. D. defendant. } made in this cause, on

Friday the 5th day of June instant (1), and the affidavit of *A. B.* (2) It is ordered, that the *de-
fendant* be remanded into the custody of the mar-
shal of the marshalsea of this court, until *Satur-
day the twentieth day of June next ensuing*; and
that the said marshal do bring the said *defendant*
into

into *Serjeants-inn hall*, at the hour of *nine* in the morning of the same day, for the purposes in the said rule mentioned, upon notice of this rule in the mean time being given to the *plaintiff*, his attorney or agent.

P. P. plaintiff. } UPON reading the last
D. D. defendant. } rule (1), the affidavit
 of *C. D. gentleman* (2), the affidavit of *G. H.*
and the account thereto annexed, the affidavit of
I. K. gentleman (3), and no cause being shewn
 to the contrary; It is ordered, that the *defen-*
dant be discharged out of the custody of the
 marshal of the marshalsea of this court, as to
 this action.

Discharging
the defendant.

(1) The above
rule.

(2) Of the ser-
vice of the last
rule.

(3) The affida-
vits filed by both
parties.

THESE rules are founded on the act of parliament commonly called the *lords act**, (which has been held *not* to extend to *qui tam* actions†) and the late act for the extension of

* 32 Geo. II. c. 28. s. 13.

† Hart, *qui tam*, v. Hawkins, 3 Burr. 1322; and
 Sir W. Black. 372. S. C.

it.

it*. The rule to bring the defendant up to be *discharged* is drawn up by the clerk of the rules, on the petition of the defendant, without any motion in court, or the signature of counsel; and the particular mode of obtaining it, and bringing the defendant up thereon, &c. may be found in the books of practice †.

If, when the defendant is brought up, he should be *remanded* till a future day, the third of the above rules will be drawn up thereon; which should be taken and left at the clerk of the papers' office for the marshal (supposing the defendant to be in his custody) who will thereon bring him up again accordingly; and if the defendant should then be ordered to be *discharged*, a rule to the effect of the last of the above rules will be drawn up thereon, which must be taken to the clerk of the papers' office, and the marshal will then immediately discharge the defendant accordingly.

But the defendant may be *remanded*, on the *undertaking* of the plaintiff (or, if he be out of England, of his attorney) to pay him his *groats*, *i. e.* 2 s. 4 d. a week, if remanded at the instance of one creditor; but if of two or more, then 1 s. 6 d.

* 33 Geo. III. c. 5.

† Tidd, 763; Impey, 470, 3d ed.

a week each*; for the court never allow less than the full money mentioned in the act†.

The undertaking should be prepared, and signed by the plaintiff, ready against the defendant is brought up, and must be drawn correctly, and the money made payable every *Monday* ‡; and, being in the nature of a promissory note, is in practice always wrote on a promissory note stamp, and may be in the following form:

“ In the King's Bench.

“ Between *P. P. plaintiff,*

“ and

“ *D. D. defendant.*

“ *I do hereby undertake and promise to*
 “ *pay to the above-named D. D. the sum of*
 “ *two shillings and four-pence weekly, and on*
 “ *Monday in every week, so long as he shall*
 “ *continue a prisoner in execution at my suit.*
 “ *Dated this fourteenth day of March, 1795.*

“ *P. P. the above-named plaintiff.*”

When the defendant is brought up, the note must be delivered by the plaintiff himself to the defendant in court, with the first

* 32 Geo. II. c. 28. s. 14.

† Loft, 348.

‡ *Lench v. Pargiter*, Doug. 67.

week's

RULES IN PERSONAL ACTIONS

week's payment, which is for the current week, as the next week's payment becomes due and must be paid on the *following Monday*; and therefore where it was not so paid, (though it appeared the non-payment happened through the mistake of the plaintiff, in considering the first week's money, which he paid the defendant when he was brought up to the assizes, to be for the week *commencing* instead of *ending*, on the following Monday) the defendant was discharged*.

But if it is not convenient for the plaintiff to attend himself, an *affidavit* of his *signature* to the note, which may be drawn to the following effect, should be annexed to the undertaking; and then the undertaking and affidavit must, in like manner, be delivered with the money by the plaintiff's attorney to the defendant in court, at the time he is brought up.

" In the King's Bench.

" Between *P. P. plaintiff*,

" and

" *D. D. defendant*.

" *A. B. of the city of Oxford, in the county of*

" *Oxford, gentleman, maketh oath and faith,*

* *White v. Heard*, 27th April 1795, before Lord Kenyon, at chambers. See the Orders, p. 112 and 113.

" That

“ That he saw the above-named *plaintiff* sign
“ the undertaking hereunto annexed, and that
“ the *name P. P.* thereto subscribed, *is* of the
“ proper *hand-writing* of the said *plaintiff*.”

When the groats become payable, to avoid the tricks often practised by the prisoners, and by which they sometimes get discharged, the money had better not be paid to the prisoner, but to the *gaoler or turnkey* in whose custody he may be, who indeed is the proper person to receive it for him *; but his receiving it, when the prisoner is intitled to his discharge for the non-payment of it, will not, it seems, affect the prisoner's right to such discharge †.

The money must always be regularly paid on the *Monday*, and that before *ten o'clock* in the *evening*, for if it is not, the defendant will be immediately entitled to his discharge ‡; and may, on an affidavit of the non-payment, accompanied by a certificate of the gaoler of

* Per Buller, J. on a summons to discharge the defendant for non-payment of the groats. *Bickley v. Tucker*, 10th July, 1792.

† *Fisher v. Bull*, 2 Term Rep. 36.

‡ *Ibid.*

RULES IN PERSONAL ACTIONS

the cause of his detainer, and an affidavit of the gaoler's signature thereto, upon application to the *court* in *term*, or to a *judge* in *vacation**, obtain an order for his discharge for non-payment of the groats, on his executing the assignment of his effects.

And if the application is made in the vacation, in a *country* cause, the first order which is made on the attendance of the plaintiff's agent, on the defendant's summons to be discharged for the non-payment of the groats, or, if he does not attend on an affidavit of the service of the summons on him, and the attendance thereon, is an order *nisi* to the effect of the first of the following orders; and then upon the attendance on the order *nisi*, or on an affidavit of the service of it, if there be no attendance on it on the part of the plaintiff, an order *absolute* is made for the defendant's discharge, to the effect of the last of the following orders.

“ *P. P.* } Upon hearing the attornies or
 “ against } agents on both sides, I order, that
 “ *D. D.* } the *defendant* be discharged out
 “ of custody, for non-payment of two shillings

* *Lench v. Pargiter*, Doug. 67.

“ and

" and four-pence weekly, pursuant to the *plain-*
 " *tiff's* undertaking, unless sufficient cause be
 " shewn to me to the contrary on or before
 " *Monday the 27th day of April next*, at eleven
 " o'clock in the forenoon, at my chambers in
 " Serjeant's Inn. Dated the *19th day of April*,
 " 1795.

" *Kenyon.*"

" *P. P.* } Upon hearing the attornies or
 " against } agents on both sides, I order, that
 " *D. D.* } the *defendant* be discharged out of
 " the custody of the *sheriff of the county of De-*
 " *von*, as to the execution at the *plaintiff's* suit,
 " for non-payment of two shillings and four-
 " pence weekly, pursuant to the *plaintiff's* un-
 " dertaking, on the *defendant's* executing *his*
 " assignment. Dated the *27th day of April*,
 " 1795.

" *Kenyon.*"

When this order is obtained, application should be made to the *associate* (with whom the defendant's schedule, &c. is lodged, on his

I

being

RULES IN PERSONAL ACTIONS

being brought up at the assizes) to prepare the *assignment*, which he will do, and send it down to the gaoler to be *executed* by the defendant; and when that is done, and the order is delivered to the gaoler, the defendant will be *discharged* accordingly.

But if the defendant is brought up in *town*, and the plaintiff resides there, the order is *absolute* at once on the *first* summons, either upon the attendance of the plaintiff's attorney or agent, or on an affidavit of the service and attendance of the summons; and the *clerk of the rules* (with whom the papers are lodged on the defendant's being brought up) prepares the assignment thereon, upon the *execution* of which the defendant will of course be *discharged*.

UPON

P. P. plaintiff. } UPON reading the affi-
D. D. defendant. } davit of the *plaintiff*,
 the certificate thereto annexed, the affidavit
 of *T. B.* and the several notices thereto an-
 nexed; It is ordered, that the marshal of
 the marshalsea of this court, upon notice of
 this rule to be given to him, or his deputy,
 shall, upon *Saturday*, the *fifteenth* day of *No-*
vember instant, bring the *defendant* into *Ser-*
jeant's Inn hall, at the hour of *nine* in the
 morning of the same day, together with a cer-
 tificate or copy of causes upon which *he is* de-
 tained or charged in his custody. And it is
 further ordered, that the said *defendant* shall
 then and there deliver in a schedule or inven-
 tory of such effects as *he* may be now, or *was*
 at the time of *his* first imprisonment in this
 action, or at any time since *he* has been pos-
 sessed of or intitled unto, and of all incum-
 brances affecting the same; and shall then and
 there upon oath, to be then and there ad-
 ministered to *him*, certify the same to the
 court, and duly assign the same for the benefit
 of the plaintiff or plaintiffs, as the said court

To bring the de-
 fendant up to
 assign his effects,
 under the com-
 pulsive clause in
 the lords act.

RULES IN PERSONAL ACTIONS

shall direct, upon notice of this rule in the mean time being given to them or their attornies.

THIS rule is founded on that part of the *lords act* *, commonly called the *compulsive* clause, as well as on the late act for the extension of it †; and as the mode of obtaining the rule does not seem to be pointed out in any of the books of practice, it may not be useless here to observe, that in order to obtain it, supposing the defendant to be in the custody of *the marshal*, a certificate of the causes of his detainer must be got from the clerk of the papers' office, and the following *notice* and *petition* should then be prepared and signed by the plaintiff, and a copy of the notice served at the clerk of the papers' office for the marshal; and on the defendant, and also on or left at the dwelling-house of every creditor, at whose suit the defendant appears by the certificate to be detained in custody; and an *affidavit* to the following effect should be made of the service of the notice, &c.:

* 32 Geo. II. c. 28.

† 33 Geo. III. c. 5. s. 3.

In

In the King's Bench.

Between *P. P. plaintiff,*

and

D. D. defendant.

Notice of the application for the rule.

Take notice, that *I* intend, on the *first day of next Michaelmas term*, or as soon after as *I* can be heard, to petition his Majesty's court of King's Bench, at Westminster, for a rule or order of the said court, directing (1) the above-named *defendant D. D.* to be brought up into this honourable court, in order that *he* (2) may be compelled to discover and deliver into the said court upon oath a true account in writing, signed by *him*, (3) of all *his* (4) real and personal estate, and of all incumbrances affecting the same, according to the best of *his* (5) knowledge and belief, in order that *his* (6) estate and effects may be devided out of *him*, (7) and may by the judges of the said court be ordered to be assigned and conveyed in manner and for the purposes declared in and by a certain act of parliament, made and passed in the thirty-second year of the reign of his late Majesty King George the Second, intituled, "An

N. B. The defendant's copy of the notice should be varied, as under.

(1) You.

(2) You.

(3) You.

(4) Your.

(5) Your.

(6) Your.

(7) You.

RULES IN PERSONAL ACTIONS

“ act for the relief of debtors, with respect to
 “ the imprisonment of their persons, and to
 “ oblige debtors, who shall continue in exe-
 “ cution in prison beyond a certain time, and
 “ for sums not exceeding what are mentioned
 “ in the act, to make discovery of, and deli-
 “ ver upon oath, their estates for their creditors
 “ benefit ;” and also in and by a certain other
 act of parliament, made and passed in the
 thirty-third year of the reign of his present
 Majesty, intituled, “ An act for the further
 “ relief of debtors, with respect to the impri-
 “ sonment of their persons, and to oblige deb-
 “ tors who shall continue in execution in pri-
 “ son beyond a certain time, and for sums not
 “ exceeding what are mentioned in the act,
 “ to make discovery of, and deliver upon oath,
 “ their estates for their creditors benefit.”

Dated the *seventeenth* day of *October* 1794.

P. P. the plaintiff above-named.

Witness *T. B.*

In

In the King's Bench.

Petition for the
rule.

Between *P. P. plaintiff,*

and

D. D. defendant.

To the Right Honourable *Lloyd Lord Ken-
yon*, Lord Chief Justice of his Majesty's
Court of King's Bench, at Westminster,
and the rest of the Judges of the same
Court.

The humble petition of *P. P. of Tower
Hill, in the city of London, upholsterer,*
the above-named plaintiff;

Sheweth,

That *D. D.* the above-named *defendant*, is
a prisoner in the custody of the marshal of the
marshalsea of this honourable court, charged
in execution at the suit of your *petitioner*, for
the sum of *one hundred and ninety-three pounds*,
as appears by the annexed certificate.

That your *petitioner apprehends* he is autho-
rized and impowered, by virtue of the com-
pulsive clause in an act of parliament [*So
through the titles of the acts, as in the notice*] to

I 4

compel

RULES IN PERSONAL ACTIONS

compel the above-named *defendant D. D.* to deliver into this court, upon oath, a true account in writing, signed by *him* the said *defendant*, of all *his* real and personal estate, and of all incumbrances affecting the same, according to the best of *his* knowledge and belief, in order that *his* estate and effects might be divested out of *him*, and assigned and conveyed in manner and for the purposes declared in the said several acts.

Your *petitioner* therefore humbly *prays* the rule or order of this honourable court for the above-named *defendant D. D.* to shew cause why *he* should not conform *himself* to the directions of the said acts.

And your *petitioner* shall ever
pray, &c.

P. P. the above-named plaintiff.

In

IN THE KING'S BENCH.

21

In the King's Bench.

Between *P. P. plaintiff,*
and

D. D. defendant.

Affidavit of the
service of the
notice, &c.

T. B. clerk to Messrs. D. and H. of Mark Lane, in the city of London, attornies for the plaintiff in this cause, maketh oath and faith, That the name P. P. set and subscribed at the foot of the petition hereto annexed, is the proper hand-writing of P. P. the plaintiff and petitioner in this cause. And this deponent further faith, that he did, on the seventeenth day of October last, serve the above-named defendant D. D. with a true copy of the notice hereunto annexed, marked with the letter (A), and which said copy was signed by the said P. P. the plaintiff and petitioner in this cause, and witnessed by this deponent, by delivering to and leaving such copy of the aforesaid notice with the said defendant D. D. himself. And this deponent further faith, that he did, on the said seventeenth day of October last, serve E. F. G. H. and J. K. being all the plaintiffs in the several actions in the annexed certificate
named

RULES IN PERSONAL ACTIONS

named (except the *said P. P. the plaintiff and petitioner* in this cause) and also *William Jones, esquire*, the marshal of the marshalsea of this honourable court, with true copies of the notice hereunto annexed, marked (*B*), and which said copies of the said last-mentioned notice were respectively signed by the said *P. P. the plaintiff and petitioner* in this cause, and witnessed by this deponent: *by delivering to, and leaving with each of them the said E. F. and G. H. one of such copies of the said last-mentioned notice; and by delivering to and leaving with the servant of the said J. K. at the house of the said J. K. in Parliament-street, Westminster, another of such copies of the said last-mentioned notice; and by delivering to and leaving another of such copies of the said last-mentioned notice with Mr. John Hill, for the aforesaid marshal, at the office of the clerk of the papers of the said marshal, in Saint George's Fields, in the county of Surrey.*

WHEN this is done, the petition and affidavit should be lodged at the clerk of
the

the rules' office, and as soon as *twenty* days, from the time of the service of the notice are expired, the clerk of the rules draws up the above rule thereon, which must be served on the defendant and creditors, in like manner as the notice was served, and the *original* rule should be left, either with the clerk of the papers, or the turnkey of the prison, and an *affidavit* to the following effect of the service of the rule made and delivered to the clerk of the rules, before or at the time the rule directs the defendant to be brought up.

" In the King's Bench.

" Between *P. P. plaintiff,*

" and

" *D. D. defendant.*

" *W. S. D. clerk to Messrs. D. and H. of*
 " *Mark Lane, in the city of London, attornies*
 " *for the plaintiff* in this cause, maketh oath
 " and faith, That he did, on *Tuesday the eleventh*
 " *day of November instant,* serve the above-
 " named *defendant D. D. and also I. K. E. F.*
 " *and G. H. (being all the plaintiffs at whose*
 " *suit the said defendant D. D. is detained in*
 " *the custody of the marshal of this honour-*
 " *able*

Affidavit of the
service of the
rule.

RULES IN PERSONAL ACTIONS

“ able court, except the *plaintiff* in this cause)
“ with a rule of this honourable court, made
“ in this cause, on *Friday* the *seventh* day of
“ *November* instant, whereby it is ordered that
“ the marshal [*so through the rule,*] by deliver-
“ ing to, and leaving a true copy of the said rule
“ at the house of the said defendant D. D. in Saint
“ George’s Fields, in the county of Surrey, with a
“ person who informed this deponent she was his
“ wife, and at the same time shewing her the said
“ original rule; and by delivering to, and leaving
“ another copy of the said rule at the house of the
“ said J. K. in Parliament Street, Westminster,
“ with a servant of the said J. K. and at the
“ same time shewing such servant the said original
“ rule; and by delivering to and leaving with the
“ said E. F. and G. H. respectively, a true copy
“ of the said rule, and at the same shewing them the
“ said original rule. And this deponent further
“ faith, that he did, on the *morning* of *Friday*
“ the *fourteenth* day of *November* instant, deliver
“ the said original rule itself to, and leave it
“ with, the turnkey of the marshal of the
“ marshalsea of this honourable court, at the
“ lobby of the said prison.”

UPON

P. D. } UPON reading the *affidavit* of the
 R. D. } *defendant and another, and the pa-*
 S. D. } *per writing thereto annexed* (1), It
 is ordered, that Mr. *A. B.* late attorney for the
 said *defendant*, shall, upon *Saturday* [*&c.*] answer
 the matters contained in the said *affidavit* —
 upon the motion of Mr. *Cowper*.

For an attorney
to answer the
matters of com-
plaint in an *affi-*
davit.

(1) Of the facts.

P. D. } UPON reading the rule made in
 R. D. } this cause, on *Friday*, [*&c.*] (1) It is
 S. D. } ordered, that the *first day of the next*
term be further peremptorily given to Mr. *A.*
B. late attorney for the said *defendant*, to answer
 the matters contained in the *affidavit* in the said
 rule mentioned. And it is further ordered,
 that the *affidavits* which the said Mr. *A. B.* in-
 tends to read at the time of answering the mat-
 ters, shall be filed *four* days before the next
 term—upon the motion of Mr. *Baldwin*.

Enlarging the
time for answer-
ing it.

(1) The above
rule.

P. D. } UPON reading the rule made in
 R. D. } this cause, on *Friday*, [*&c.*] (1) *the*
 S. D. } *subsequent rule made thereon* (2), the
affidavit of *A. B.* gentleman, the *affidavit* of *G.*
H.

Discharging the
rule, upon the
attorney's pay-
ing certain costs.

(1) The first
rule.

(2) The second
rule.

(3) The affidavits on both sides.

H. gentleman and another (3), and upon hearing counsel for the defendant, and also for the said Mr. A. B. in the said rule named; It is ordered, that the said Mr. A. B. do forthwith pay to the defendant D. D. or to Mr. F. his now attorney, the costs the said defendant hath been put unto in these causes, to be taxed by Mr. Benton; and it is referred to the said Mr. Benton to tax the said defendant his costs occasioned by this application: which costs, when taxed, shall also be paid by the said Mr. A. B. to the said defendant, or to the said Mr. F. his now attorney, and thereupon the said rule be discharged—upon the motion of Mr. Cowper for the defendant, and Mr. Baldwin for Mr. A. B.

WHEN an attorney has misconducted himself in the course of a cause or otherwise towards his client, the court will interpose its aid on behalf of the person injured, and grant him relief in a summary way by motion, according to the circumstances of the case; and will therefore, on a motion, supported by an *affidavit* of the facts, grant the above rule to answer the matters of the complaint,

plaint, and afterwards make such ultimate rule thereon, as the justice of the case may require, and will generally make the attorney pay the *costs* incurred by his improper conduct *. Indeed the first of these rules is frequently a preliminary one to a rule against the attorney for an *attachment*, where he has been guilty of gross fraud and corruption, injustice to his client, or other dishonest practice †.

But if it does not appear that the attorney was *grossly negligent, ignorant, or intentionally blameable*, the court will not proceed against him in a summary way ‡; and it may be observed, that where they do, and give a *specific relief* by an order in a case, where by law the party is *not* intitled to *two* different remedies, he will not be suffered to pursue a second recompence; and therefore if he afterwards brings an action for the same cause, the court will stay the proceedings in such action, though it is otherwise where *two* different remedies *are* given by law, as where an arrest is illegal, for there the court only correct the irregularity,

* And see Loft 84; and Doe, ex. dim. Jupp v. Andrews, Cowp. 845.

† 4 Black. Com. 284. 7th ed.

‡ Pitt v. Yalden, 4 Burr. 2060.

and

RULES IN PERSONAL ACTIONS

and leave the party to his remedy for the false imprisonment*.

If a party called on by a similar rule to the above one to answer the matters in an affidavit, or by a rule nisi, cannot be prepared, or is not ready to answer the matters, or shew cause by the day named in the rule, the court will in general, on a suggestion of the reason, without any affidavit, give *further time*, and then a rule to the effect of the second of the above rules is drawn up thereon. But the court commonly direct it to be made a part of the enlarged rule, that the *affidavits* intended to be read at the time of answering the matters, or shewing cause, shall be filed by *a particular day*, to give the other party an opportunity of taking the office copies in time. And every rule enlarged to the subsequent term is fixed for a *peremptory* day in this manner, the first five for the first day, the second five for the second day, and so on; and after the term a list of the enlarged rules, with the times when they are appointed to come on, is made by the clerk of the rules, and stuck up in his office, and a copy of it is delivered to the judges the day before the beginning of every term†.

* Cameron et al. v. Reynolds Under Sheriff, Cowp. 403.

† Order H. T. 6 Geo. III.

U P O N

P. } UPON reading the affidavit of *A. B.*
 D. } *gentleman, and another, (1)* and the *warrant of attorney* therein mentioned, It is ordered, that the *plaintiff* have leave to enter up judgement against the *defendant* upon the said *warrant of attorney*—upon the motion of Mr. *Gibbs*.

To enter up judgement on an old warrant of attorney.

(1) Of the facts.

IF a warrant of attorney has been executed *above a year*, judgement cannot afterwards be entered up on it without leave of the court, by obtaining the above rule, the motion for which is of course, on an *affidavit* of the execution of the warrant of attorney, of the money due on it, and of the defendant's being alive.

So, if the warrant of attorney be given to a *feme sole*, and she afterwards *marries*, leave must in like manner be obtained, on an *affidavit* of the marriage, to enter up the judgement in the name of the husband and wife; and if entered up without, it will be *irregular*, and the court will therefore set the judgement aside*.

And if a warrant of attorney be given to *two* persons, and *one* of them *dies* before the judge-

* *Marder et Ux. v. Lee*, 3 Burr. 1469; and Loft 330.

ment is entered up, the court will, on an *affidavit* of the circumstances, give the survivor leave to enter it up*.

* *Todd v. Dodd*, 1 Wil. 312; and *Sayer*, 5. S. C.

THE END.



ERRORS.

Page 45, line 1, insert before the word it, "upon reading the affidavit of A. B."

P. 46, l. 11, for "without any," insert "on an."

